

In The Matter Of:
United States vs.
PFC Bradley E. Manning

Vol. 9
June 25, 2013
UNOFFICIAL DRAFT - 6/25/13 Morning Session

Provided by Freedom of the Press Foundation

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VOLUME IX

IN THE UNITED STATES ARMY

UNITED STATES

VS.

MANNING, Bradley E., PFC COURT-MARTIAL

U.S. Army, xxx-xx-9504

Headquarters and Headquarters Company,

U.S. Army Garrison,

Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

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The Hearing in the above-entitled matter was

held on Tuesday, June 25, 2013, commencing at 9:30 a.m.,

at Fort Meade, Maryland, before the Honorable Colonel

Denise Lind, Judge.

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1 APPEARANCES :

2
3 ON BEHALF OF THE GOVERNMENT :

4 MAJOR ASHDEN FEIN

5 CAPTAIN JOSEPH MORROW

6 CAPTAIN HUNTER WHYTE

7
8 ON BEHALF OF THE ACCUSED :

9 DAVID COOMBS

10 MAJOR THOMAS HURLEY

11 CAPTAIN JOSHUA TOOMAN

1 PROCEEDINGS,

2 THE COURT: Court is called to order. Major
3 Fein, please account for the parties.

4 MR. FEIN: Yes, ma'am. Your Honor, all
5 parties in the court last recessed are again present with
6 the following exceptions: Mr. Chavez, court reporter, is
7 absent. Mr. Robert Shaw, court reporter, is present.

8 Your Honor, correction. Mr. Robert Shaw was
9 here last week. It was so long ago I forgot.

10 Also Captain von Elten is absent, Captain
11 Whyte is present.

12 THE COURT: All right. Thank you. Do you
13 have a report for the media operations center as well?

14 MR. FEIN: Yes, ma'am. As of this morning at
15 the start of the session there are eleven members of the
16 media and one stenographer and there's approximately 15
17 spectators in the courtroom. There are no spectators in
18 the trailer, although the trailer is available to be
19 used, if needed.

20 THE COURT: All right. Thank you.

21 Counsel and I met in a brief RCM 802

1 conference this morning. Once again, those are
2 conferences where I go over logistics and scheduling
3 issues with counsel, and we have arrived at an order of
4 march for this week.

5 Today will be a relatively short session.
6 We're going to basically just introduce what the parties
7 have added to the record since the last session, and then
8 at 11:30 today we will be having oral argument with
9 respect to judicial notice motions that have been filed
10 by both side. The defense filed one, the prosecution
11 then filed another one. And then the court will be
12 taking that under advisement and the court will go in
13 recess for today. And tomorrow we will begin again with
14 the presentation of evidence.

15 Now, Major Fein, would you like to discuss,
16 for the record I believe we have a grant of immunity that
17 has been signed?

18 MR. FEIN: Yes, Your Honor. What has been
19 marked as appellate exhibit 578 is a grant of immunity
20 for a witness based off a request -- well, at
21 government's request. Also, Your Honor, to account for

1 housekeeping purposes, the government's response to
2 defense motion for judicial notice has been marked as
3 appellate exhibit 574. The government's motion for
4 judicial notice and the defense's response will be marked
5 once they're complete, as 576 and 577 to be reflected
6 later. Also the government order of witness list update
7 has been marked as appellate exhibit 575.

8 THE COURT: Just for the record, at the 802
9 conference the government advised me that the government
10 had already emailed to the defense and the court with
11 respect to what their motion for judicial notice was had
12 an error in it, and they've revised that error in a
13 corrected copy to be filed for the record. Defense's
14 response to that motion responded to the motion as it
15 originally was. It's just a minor change. And the
16 defense also intends then to file a corrected copy of its
17 response. The original copies are not going to go into
18 the record at this point because they're not accurate and
19 the parties don't want them in the record, so the
20 corrected copies will be the judicial notice motions. Is
21 that accurate?

1 MR. FEIN: Yes, ma'am.

2 MR. COOMBS: Yes, Your Honor.

3 THE COURT: Okay. Now, two issues also arose
4 at the RCM 802 conference. One of them is whether the
5 government, the government asked whether the court would
6 require classified stipulations or portions of
7 stipulations that contained classified information to be
8 read on the record in classified sessions. I asked the
9 defense for their position on that. The court can read
10 the stipulation, I'm the finder of fact, but defense,
11 what was your position on that?

12 MR. COOMBS: Yes, Your Honor.

13 The defense does not have an objection to the
14 court reading the classified portions and therefore not
15 requiring the government to read those in a closed
16 session. Additionally the defense does not have an
17 objection to the court having access to the stipulations
18 of expected testimony during your deliberations.

19 THE COURT: Thank you.

20 MR. FEIN: And, ma'am, also I just add one
21 more thing discussed in chambers. The stipulations of

1 expected testimony will be portion marked, so those
2 portions that are unclassified will be read on the public
3 record. It's only those portions that are classified
4 that won't be.

5 THE COURT: Is there anything else that we
6 need to address at this point that has not been
7 discussed?

8 MR. FEIN: No, ma'am.

9 MR. COOMBS: No, Your Honor.

10 THE COURT: All right. Is 11:30 sufficient
11 for the parties to reconvene and argue the judicial
12 notice motions?

13 MR. FEIN: Yes, ma'am.

14 MR. COOMBS: Yes, Your Honor.

15 THE COURT: Court is in recess.

16 (RECESS.)

17 THE COURT: Court is called to order. Let
18 the record reflect all parties present when the court
19 last recessed are again present in court.

20 Major Fein, would you like to add for the
21 record what has been added as appellate exhibits or other

1 exhibits?

2 MR. FEIN: Yes, ma'am.

3 Ma'am, first is an appellate exhibit, what
4 has been marked as appellate exhibit 580 is the
5 assumption of command orders from the new commander,
6 Military District of Washington and the general convening
7 authority for this court-martial effective as of 0001
8 hours, 24 June, 2013.

9 Your Honor, what has been marked -- I'm
10 sorry. May I have a moment, Your Honor?

11 THE COURT: Yes.

12 MR. FEIN: Your Honor, what has been marked
13 as prosecution exhibit 135 Alpha is the same document
14 that was previously marked prosecution exhibit 135 Alpha,
15 that is a stipulation of expected testimony from Miss
16 Katherine Strobl. This stipulation of expected testimony
17 was read into the record but there was a mistake in
18 redactions and that mistake has been corrected. The
19 defense has been provided a copy and so has the court and
20 the record as well. Again, that's prosecution exhibit
21 135 Alpha.

1 Also, Your Honor, what has been replaced in
2 the record with a cleaner, more legible prosecution
3 exhibit is 138 for identification and 139 for
4 identification. Those are screenshots of the open source
5 center log-in account information, again, prosecution
6 exhibit 138 for identification and prosecution exhibit
7 139 for identification.

8 Those both are referenced by the stipulation
9 of expected testimony of Mr. Maxwell Allen, prosecution
10 exhibit 137. And United States moves to admit
11 prosecution exhibits 138 and 139 for identification as
12 prosecution exhibits 138 and 139.

13 THE COURT: Any objection?

14 MR. HURLEY: No, ma'am.

15 THE COURT: All right. I notice plaintiff's
16 exhibits 138 for identification 139 for identification
17 are more legible than the original copies. As such, the
18 court will admit them in the absence of defense
19 objection.

20 Is there anything else we need to address?

21 MR. FEIN: Yes, ma'am. The government's

1 motion for judicial notice, it's corrected copy has been
2 marked as appellate exhibit 576 and the defense's
3 response has been marked as appellate exhibit 577. That
4 is all the documents that have been marked, Your Honor.

5 THE COURT: All right. Are the parties ready
6 to proceed with oral argument?

7 MR. TOOMAN: Yes, ma'am.

8 MR. WHYTE: Yes, ma'am.

9 THE COURT: Why don't we begin with the
10 defense requests for judicial notice as they were filed
11 first? Captain Tooman.

12 MR. TOOMAN: Yes, ma'am.

13 Ma'am, I'll begin with the Apache
14 classification review which was conducted by Rear Admiral
15 Donegan. Essentially this is proper for judicial notice
16 because, first off, it's relevant to the charges for the
17 Apache video, whether or not that was closely held. And
18 in response to the government's --

19 THE COURT: Let me just ask you a question.
20 I'm sorry to interrupt you a little bit. Government, I
21 believe in your response you said that the government

1 hasn't presented any evidence and doesn't intend to
2 present any evidence that that video was classified.

3 MR. WHYTE: That's correct, Your Honor. It's
4 not inconsistent with the government's position that it's
5 not classified. It's an unclassified video.

6 THE COURT: Are you willing to stipulate to
7 that?

8 MR. WHYTE: Yes, ma'am, we will stipulate
9 that it was an unclassified video. We obviously will not
10 stipulate that it was not closely held.

11 THE COURT: So if you're stipulating that
12 it's an unclassified video, what is the additional
13 relevance of this statement by Rear Admiral Donegan?

14 MR. TOOMAN: We believe that it would rebut
15 prosecution exhibit 117 which is the stipulation for CW5
16 Larue.

17 THE COURT: Okay. Hold on just a minute.
18 And that is where in your brief?

19 MR. TOOMAN: It wasn't in our brief, Your
20 Honor, because we weren't aware of that being the
21 government's position when we filed our brief, when we

1 filed our request. At that point we weren't aware the
2 government was taking the position that the memo from
3 Admiral Donegan was consistent with what they have put
4 forward.

5 THE COURT: So it rebuts testimony of Chief
6 Larue?

7 MR. TOOMAN: Yes, ma'am.

8 THE COURT: May I see prosecution exhibit
9 117, please?

10 MR. TOOMAN: We point your attention to
11 paragraph eight, ma'am, in which Chief Larue discusses
12 his opinion of the video contains TTPs, sensitive Army
13 aviation information. We believe the memorandum from
14 Rear Admiral Donegan to the Judge Advocate General of the
15 Army rebuts that and says that there are no TTPs.

16 And the defense believes that this would be
17 proper for judicial notice using the test from Salerno.
18 This is an official correspondence from Rear Admiral
19 Donegan to a three star general, the Judge Advocate
20 General of the Army. It's on official letterhead. For
21 those reasons we think it has the reliability of

1 testimony. There's no reason to believe that Admiral
2 Donegan was not being forthright in his correspondence to
3 TJA. So we believe it would satisfy the test of Salerno.

4 The government also points out that Admiral
5 Donegan is on their witness list for sentencing; that
6 won't do us any good to cross examine him on sentencing
7 instead of the merits.

8 THE COURT: Is there a stipulation of
9 expected testimony?

10 MR. WHYTE: No, ma'am. He's just a
11 sentencing witness.

12 THE COURT: What is the defense's position
13 with respect to the first part of the Salerno test?

14 MR. TOOMAN: We believe this is an assertion
15 of fact. We have Vice Admiral Harward who is the OCA, we
16 have a stipulation of testimony from him for the CENTCOM
17 stuff. He doesn't address this particular video and so
18 our position would be this correspondence from Rear
19 Admiral Donegan is the closest thing we have to a OCA
20 assessment of the video.

21 THE COURT: Okay. Why don't we run through

1 all three of them and then I'll let the government talk.

2 MR. TOOMAN: Yes, ma'am.

3 THE COURT: All right. I think I understand
4 your position.

5 MR. TOOMAN: With respect to the transcript,
6 the transcript of the Apache video, the defense has no
7 issue with the changes that the government made and so it
8 seems from their response that they would be okay with
9 the court taking judicial notice of the second enclosure
10 from their response.

11 THE COURT: Does the government have any
12 objection to me taking judicial notice of the enclosure,
13 second enclosure to your response as edited?

14 MR. WHYTE: Yes, ma'am. We would agree to
15 stipulate to the transcript as being a verbatim
16 transcript of the video. We don't think it's actually
17 proper for judicial notice.

18 THE COURT: Why not?

19 MR. WHYTE: Because there are no facts to
20 support that this actually is correct, and also this
21 isn't commonly known in the community.

1 THE COURT: So if you're stipulating that
2 this is an accurate transcript, if the defense were to
3 offer the transcript itself, there would be no
4 authentication objection, right?

5 MR. WHYTE: That is correct, ma'am.

6 THE COURT: So, Captain Tooman, what's the
7 difference, why should I take judicial notice of it if
8 you can just introduce it as an exhibit?

9 MR. TOOMAN: That's fine, Your Honor. We'll
10 offer it. I would think you could because it's easily
11 verifiable. You can watch the video and follow along and
12 you can see that it's accurate. So we think that it is
13 proper for judicial notice because you could easily
14 verify it.

15 THE COURT: Okay. Government, I know I'm
16 going to let you argue here, but if I go through the
17 video and I go step by step and this transcript is -- is
18 this going to be exactly what the defense says, that's
19 what I'm going to be hearing is enclosure two?

20 MR. WHYTE: Yes, ma'am, it is. It's
21 verbatim. We confirm it.

1 THE COURT: Okay. I understand. So that's
2 the only objection that I saw that the government had to
3 the court taking judicial notice of that transcript, is
4 that correct?

5 MR. WHYTE: Yes, ma'am.

6 THE COURT: All right. Captain Tooman,
7 proceed.

8 MR. TOOMAN: Thank you, ma'am.

9 I guess the last piece at issue would be the
10 relevance of the FOIA correspondence related to the Farah
11 or the Granahi video. There we think this is relevant.
12 The government's response to this suggested there was no
13 evidence before the court that PFC Manning had any
14 knowledge of this. We would point the court to
15 prosecution exhibit 30 which --

16 THE COURT: Why isn't that in your brief?

17 MR. TOOMAN: Again, Your Honor, we weren't
18 aware of the government's objection when we drafted our
19 brief.

20 THE COURT: All right. Your brief talks
21 about the providence inquiry. Does the defense agree

1 with me that nothing -- the providence inquiry
2 establishes elements. Whatever is said in the providence
3 inquiry is not evidence before the court?

4 MR. TOOMAN: Yes, ma'am.

5 THE COURT: So I'm summarily ruling against
6 the defense in that respect.

7 MR. TOOMAN: Yes, ma'am.

8 THE COURT: So what's prosecution exhibit 30,
9 may I see it, please?

10 MR. TOOMAN: Ma'am, those are the chats
11 between PFC Manning and Adrian Lamo.

12 THE COURT: Before we get there, your second
13 basis that you have in the brief is it's going to rebut
14 statements by Miss Showman. To the court's knowledge the
15 government hasn't introduced those statements. Is that
16 an accurate statement of fact at this point?

17 MR. TOOMAN: Yes, ma'am.

18 THE COURT: Okay.

19 MR. MORROW: Your Honor, if I may, are we
20 referring to the FOIA request for the Farah or the
21 Granahi. Captain Tooman said the --

1 MR. TOOMAN: I'm sorry. I misspoke.

2 The FOIA request in this case is for the
3 Apache video. I am speaking of the FOIA request for the
4 Apache video.

5 Your Honor, in the chats between PFC Manning
6 and Adrian Lamo, PFC Manning on May 25 at --

7 THE COURT: What page?

8 MR. TOOMAN: I'm not sure the page on the
9 prosecution exhibit, ma'am.

10 THE COURT: Why don't we do this, Captain
11 Tooman? What I'll do is I'll have the government get up
12 and put their position with respect to the first judicial
13 notice request at issue, and then the defense team can
14 find the appropriate page and when you come back up for
15 reply, we can address that.

16 MR. TOOMAN: Okay, Your Honor.

17 THE COURT: Is there anything else that you
18 want to --

19 MR. TOOMAN: Well, I think the rest of our
20 argument with respect to this will rely on the chats.

21 THE COURT: Okay.

1 MR. TOOMAN: Thank you.

2 THE COURT: Government. First of all, I
3 understand from your brief you're not objecting to the
4 9/11 page or messages requests for judicial notice, is
5 that correct?

6 MR. WHYTE: Yes, ma'am.

7 THE COURT: In light of the fact that there's
8 no objection, the court will take judicial notice of
9 that.

10 MR. WHYTE: So, ma'am, first with the defense
11 request that this court take judicial notice of the --

12 THE COURT: Can you speak a little bit
13 louder?

14 MR. WHYTE: Yes, ma'am. I'm sorry. The
15 defense is requesting that this court take judicial
16 notice of the CENTCOM classification assessment of the
17 Apache video. The United States obviously opposes. We
18 think -- it's the government's position that this is not
19 an assertion of fact. Instead, if Your Honor reads Rear
20 Admiral Donegan's statement, that this is purely his
21 opinion that this video should be unclassified.

1 THE COURT: The defense at oral argument
2 advised the court that it's being offered to rebut the
3 testimony in prosecution exhibit 117 of CW5 Larue
4 regarding the TTPs. Is it the government's position that
5 the TTP portion of his declaration is an opinion versus
6 an assertion of fact?

7 MR. WHYTE: Yes, ma'am. We think his entire
8 statement is an opinion, not a definitive saying this is
9 unclassified. In the first few sentence it says it's in
10 our -- I forget the words, but I think he says it's our
11 opinion.

12 THE COURT: The sentence I'm reading it says,
13 Under this category, operational information may be
14 unclassified if the information describes a past event in
15 general terms, provides no indicators of potential future
16 operations, does not provide specific locations, unit
17 data, TTPs, or does not embarrass coalition members.

18 MR. WHYTE: Yes, ma'am. But in the first
19 sentence of the second paragraph, where Rear Admiral
20 Donegan says in arguing that the video should be
21 unclassified, that statement that you just read, Your

1 Honor, goes towards, again, his opinion. This is why his
2 opinion is that it should be unclassified.

3 THE COURT: Well, let me ask a question and
4 I'll ask it of the defense first. Should I decline to
5 take judicial notice of this statement from Rear Admiral
6 Donegan, would the defense be requesting him as a witness
7 for the merits?

8 MR. TOOMAN: Yes, ma'am.

9 THE COURT: So, government, if I decline to
10 -- your basic objection is hearsay. So if I decline to
11 take judicial notice and the defense asks for him as a
12 witness, is the government prepared to produce him?

13 MR. WHYTE: One second, Your Honor.

14 THE COURT: Yes, certainly.

15 (DISCUSSION OFF THE RECORD.)

16 MR. WHYTE: Well, Your Honor, I think that we
17 would still prefer to litigate whether or not his
18 testimony would be relevant for the merits under a 703
19 litigation.

20 THE COURT: You had a stipulation of expected
21 testimony from CW5 Larue saying that he verified the

1 results -- let's see. Hold on.

2 Do you have prosecution exhibit 117 in front
3 of you?

4 This witness is saying that TTPs are a puzzle
5 and revealing any piece can make the puzzle easier for
6 adversary. Wouldn't the relevance of Rear Admiral
7 Donegan's testimony to be to rebut that?

8 MR. WHYTE: Your Honor, the defense is
9 invited to offer -- Rear Admiral Donegan is just stating
10 what was actually included in the classification guide as
11 far as when I read Rear Admiral Donegan's statement.

12 THE COURT: But if he's saying in his opinion
13 it's not classified, wouldn't that necessarily entail the
14 fact that it wouldn't contain a TTP or TTPs?

15 MR. WHYTE: In his opinion, yes, ma'am. Not
16 as in a fact, him definitively saying it contains
17 nothing. This is just his opinion.

18 THE COURT: And that wouldn't go to rebut CW5
19 Larue's opinion?

20 MR. FEIN: Ma'am, may we have a moment,
21 please?

1 THE COURT: Yes.

2 (DISCUSSION OFF THE RECORD.)

3 THE COURT: The court is happy to take a
4 recess if the parties would like.

5 MR. FEIN: No, ma'am.

6 (DISCUSSION OFF THE RECORD CONTINUES.)

7 MR. FEIN: Your Honor, if we may, may another
8 counsel argue this one point for the government?

9 THE COURT: Yes. Go ahead.

10 MR. FEIN: Ma'am, the United States directs
11 the court's attention to the actual Admiral Donegan memo.
12 The purpose of the Admiral Donegan memo is tasker CENTCOM
13 assessment of First Cav division classification of
14 termination of the Apache video. The entire purpose of
15 this memorandum to the Office of Judge Advocate of the
16 Army was for a cost classification, to determine whether
17 it was classified, wasn't to do a fact based analysis of
18 whether a TTP did or did not exist. It's whether they
19 warranted classification. TTPs and other information
20 provided in this memo could warrant classification; does
21 not mean it factually contains it or did not. Again, the

1 purpose of this memo is exactly as it states in the memo,
2 whether it warrants classification. Therefore, could it
3 cause damage to national security, serious damage or
4 grave damage?

5 Admiral Donegan's opinion in this memo, Your
6 Honor, is it doesn't warrant any of those protections,
7 thus is unclassified, but there is no statement here, the
8 purpose of this memo isn't to say whether TTPs existed or
9 not. And the defense would object likely -- excuse me --
10 the United States would likely object to if the defense
11 filed a motion to compel production simply because it is
12 their conjecture that that is what he would say. They
13 have no clue that Admiral Donegan would say that the
14 video does or does not contain TTPs. It's only whether
15 it warrants classification. And Chief Larue's
16 stipulation of expected testimony simply states the fact
17 it does contain TTPs.

18 THE COURT: Well, it goes beyond that. It
19 says that the TTPs are a puzzle and revealing any piece
20 could make solving the puzzle easier for an adversary.

21 MR. FEIN: Yes, ma'am. But according to at

1 least that video, at that time on 13 October 2010 under
2 Admiral Donegan, in his opinion, not to the level that
3 warrants classification. Doesn't mean TTPs doesn't
4 exist. Again, the purpose for this memo is
5 classification and review.

6 So going back to what my co-counsel started
7 with as an argument, this is an opinion of whether
8 something's classified based off the factors given.
9 Those factors are listed.

10 THE COURT: So is your objection then to the
11 relevance of producing this witness, is it the defense
12 hasn't talked to them and doesn't know what the witness
13 is going to say about TTPs?

14 MR. FEIN: That would be the first one, Your
15 Honor. We'd want to hear what the defense has to proffer
16 about the entire scope of the testimony. If it's simply
17 to ask one factual question on whether it did or did not
18 have TTPs involved in the video, that's one thing. If
19 it's more than that.

20 THE COURT: All right. I understand the
21 government's position.

1 MR. WHYTE: Ma'am, as far as the second fact
2 that the defense is asking this court to take judicial
3 notice of, the FOIA request, it's not relevant at this
4 point. There's no evidence that PFC Manning had
5 knowledge of this FOIA request or CENTCOM's alleged
6 response thereto, so we would object on relevance, ma'am.

7 THE COURT: Okay. And that's basically, I'll
8 allow you to come back too after the defense comes back
9 because now they're going to tell me what's in the
10 prosecution exhibit 30 that they believe is going to make
11 this relevant.

12 Go ahead.

13 MR. TOOMAN: I will hand you prosecution
14 exhibit 30, as well as prosecution exhibit 15 which is a
15 picture.

16 Your Honor, we believe the government has put
17 forth evidence that would suggest that PFC Manning was
18 aware of the Reuters FOIA request. First we direct your
19 attention to prosecution exhibit 15 which is a CD.

20 THE COURT: That's for identification.

21 MR. TOOMAN: Yes, ma'am.

1 THE COURT: So it's not in evidence.

2 MR. TOOMAN: Right. The government has
3 talked about it.

4 MR. FEIN: Your Honor, 15 was admitted.

5 THE COURT: Oh, it was?

6 MR. FEIN: Yes, Your Honor.

7 MR. TOOMAN: The picture is a substitution,
8 ma'am.

9 THE COURT: I see. Okay. Let me just
10 actually go ahead and admit it then. Both sides agree
11 prosecution exhibit 15 is admitted?

12 MR. FEIN: Yes, ma'am.

13 MR. TOOMAN: Yes, ma'am.

14 So you'll see on prosecution exhibit 15 the
15 CD titled CZ engagement zone, etcetera, etcetera, it also
16 says Reuters FOIA request. So that would suggest that
17 PFC Manning was aware of the Reuters FOIA request because
18 he labeled it Reuters FOIA request.

19 Additionally, ma'am, in prosecution exhibit
20 30, the chat logs, there are a number of references to
21 this incident on page 26 of your copy and going into page

1 27.

2 THE COURT: Hold on.

3 MR. TOOMAN: Starting at time marker, 3:10:32
4 seconds p.m. PFC Manning is talking about this video.
5 He's talking about doing research on it. He's talking
6 about the Finkel book.

7 THE COURT: You said it's on page 26 of mine?

8 MR. TOOMAN: Yes, ma'am. 26, and it goes
9 into 27, I believe. Time stamp 3:10:32.

10 THE COURT: Where does it talk anything about
11 a FOIA request?

12 MR. TOOMAN: He's talking about the video
13 specifically, Your Honor. Here he doesn't reference FOIA
14 explicitly, but he's talking about the research he did
15 into the incident.

16 THE COURT: How is the FOIA request -- how
17 does that tie into the FOIA request?

18 MR. TOOMAN: It suggests that he was aware of
19 what happened and he was looking into it. And if you
20 look at page 33, again, he doesn't talk about FOIA
21 request, but at time stamp 2:24:58 a.m.

1 THE COURT: 2:24. Okay. We must have
2 different pages here. Because that's on 34 of mine.

3 MR. TOOMAN: I'm sorry, Your Honor. 34 of
4 yours.

5 Again, he's talking about this video. And
6 then on page 33 of yours --

7 THE COURT: Hold on. Okay. And I'm sorry.
8 What's the next one?

9 MR. TOOMAN: On your page 33 at 2:07:41 a.m.,
10 you see him say event occurs in 2007. I watched video in
11 2009 with no context. Do research. Forward information
12 to the above. FOI activity. So there he's talking about
13 freedom of information, researching the incident, and
14 these things taken in totality suggests that PFC Manning
15 was aware of the FOIA request by Reuters. Particularly
16 when viewed in conjunction with prosecution exhibit 15 in
17 which he labels the CD Reuters FOIA request. So based on
18 that, we think this is relevant and we've overcome the
19 government's objection because there is evidence that
20 suggests PFC Manning was aware of this FOIA request.

21 THE COURT: All right. Thank you.

1 Captain Whyte.

2 MR. WHYTE: Could we have one second, Your
3 Honor?

4 THE COURT: Yes.

5 (DISCUSSION OFF THE RECORD.)

6 THE COURT: Before you start, Captain Whyte,
7 I do have a question for you. Your objection is based on
8 relevance, initially because of the providence inquiry as
9 originally set forth by the defense in their brief, and
10 now you'll be addressing what has been raised in oral
11 argument. But before you do that, the actual enclosures
12 themselves, the Freedom of Information Act request and
13 the response, does the government object to its
14 authenticity, the fact that when these things were filed,
15 what they say?

16 MR. WHYTE: Your Honor, we would not object
17 that the defense has provided the court with sources that
18 pursuant to MRE 201 are sufficient.

19 THE COURT: Okay.

20 MR. WHYTE: So, Your Honor, based on this new
21 argument by the defense, it's obvious that PFC Manning

1 labeled that CD FOIA request. We would still argue it
2 doesn't necessarily prove that PFC Manning had knowledge
3 of this particular request. It could have been any type
4 of request, or the contents of the request, or the fact
5 CENTCOM eventually did respond to the FOIA request.
6 There's still no evidence of that.

7 THE COURT: No evidence that of what?

8 MR. WHYTE: That CENTCOM responded to the
9 request. Because the CD, as far as I remember, Your
10 Honor, I don't have it with me, but I think it said,
11 labeled the event and then said FOIA request.

12 THE COURT: So if I'm understanding what
13 you're telling me, there's no evidence on the record that
14 PFC Manning knew that CENTCOM, whether CENTCOM did or did
15 not respond to a FOIA request.

16 MR. WHYTE: Correct. Yes, ma'am.

17 THE COURT: Okay. So is the government,
18 what's the government's position with respect to
19 enclosures one and two, the fact that there were FOIA
20 requests? Or a FOIA request from Reuters.

21 MR. WHYTE: As far as whether or not the

1 court should take judicial notice?

2 THE COURT: Yes.

3 MR. WHYTE: We don't object or we don't
4 oppose that there was a FOIA request. Again, these
5 sources confirm that that fact actually did happen.
6 Again, we still don't think it's relevant for judicial
7 notice. The defense is free to offer this evidence in
8 their case.

9 THE COURT: Well, I think that's what -- you
10 said that the defense is free to offer this evidence in
11 their case. So if the court doesn't take judicial notice
12 of it, the defense is going to require witnesses to
13 authenticate the -- to testify about this and
14 authenticate these FOIA requests, right?

15 MR. WHYTE: And the government will stipulate
16 that these FOIA requests actually happened. But as far
17 as evidence that PFC Manning knew of the substance of the
18 FOIA request and knew that CENTCOM responded, we don't
19 think at this point, Your Honor, there's really any
20 evidence out there that would support a judicial notice.

21 THE COURT: I wouldn't be taking judicial

1 notice that PFC Manning knew that there was FOIA requests
2 out there and that they responded. I'm just taking
3 judicial notice of the FOIA request itself. Those links
4 and those leaps and inferences, that's a job of the
5 parties, not me.

6 MR. WHYTE: Yes, ma'am.

7 THE COURT: So under those circumstances.

8 MR. WHYTE: We wouldn't object, Your Honor,
9 that those actually happened and that the court could
10 take judicial notice of those facts.

11 THE COURT: So you're not objecting any more.

12 MR. WHYTE: We still don't believe that
13 there's evidence out there to confirm that, again, PFC
14 Manning knew about this to establish relevance for --

15 THE COURT: So are you objecting to
16 relevance? For judicial notice, I'm not going to take
17 judicial notice of something that's not relevant. So
18 talk to your compatriots there and tell me what the
19 government position is.

20 (DISCUSSION OFF THE RECORD.)

21 MR. WHYTE: Your Honor, we won't object that

1 there was a FOIA request and that there was a CENTCOM
2 response, so we withdraw our objection to that fact.

3 THE COURT: So the government is not
4 objecting to the court taking judicial notice of
5 enclosures one, two and three of the defense motion?

6 MR. WHYTE: That's correct, Your Honor.

7 THE COURT: So just to wrap up here then,
8 remaining at issue from the defense motions for judicial
9 notice that the government does not object to the 9/11
10 pager messages and the government does not object to the
11 FOIA requests and the response. And the government does
12 not object to the transcript at prosecution exhibit 15,
13 enclosure two by the government, that that's an accurate
14 transcript of the video?

15 MR. WHYTE: Yes, ma'am.

16 THE COURT: So all we have remaining at issue
17 now is Rear Admiral Donegan, right?

18 MR. WHYTE: Yes, ma'am.

19 THE COURT: Both sides agree?

20 MR. TOOMAN: Yes, ma'am.

21 THE COURT: All right. And let's move to --

1 is there anything else we need to address with respect to
2 the defense requests for judicial notice?

3 MR. TOOMAN: No, Your Honor.

4 MR. WHYTE: No, ma'am.

5 THE COURT: And I'm not going to hear any
6 more about providence inquiry statements made as
7 evidence, right?

8 MR. TOOMAN: Yes, ma'am. No, ma'am.

9 THE COURT: That was a double negative
10 question, so let me -- I will be hearing no further
11 evidence, is that correct?

12 MR. TOOMAN: That is correct, Your Honor.

13 THE COURT: Okay. Let's move on to the
14 prosecution request for judicial notice.

15 MR. WHYTE: Yes, ma'am. The United States
16 requests that this court take judicial notice of several
17 facts. It may be helpful to break them up as we did in
18 our motion.

19 First of all, the WikiLeaks releases. Your
20 Honor, we request that the court take judicial notice of
21 the five releases by WikiLeaks. The defense opposed

1 alleging that we haven't established relevance. We
2 completely oppose that obviously under a 401, MRE 401,
3 this evidence is relevant. Not only to establish that or
4 as evidence to show that these documents or the video
5 were closely held at the time prior to the releases, but
6 also for most of the offenses for specification one of
7 charge two PFC Manning is charged with causing
8 intelligence be published on the Internet. The fact that
9 WikiLeaks released these five sets of documents or media
10 is relevant to not only the closely held element of the
11 793 offenses, but also to the spec one of charge two.

12 THE COURT: If it is relevant to
13 specification one of charge two, what other
14 specifications, this first grouping of five, in addition
15 to 793E specifications, what else is the government
16 claiming they're relevant to?

17 MR. WHYTE: It's also relevant to the 641
18 offenses, ma'am. PFC Manning is charged with stealing,
19 purloining, or knowingly converting. These documents or
20 this video and the fact that WikiLeaks released it later
21 is evidence to show that under the MRE 401 standard that

1 PFC Manning compromised those videos in the timeframe
2 alleged.

3 THE COURT: Why isn't any of that in your
4 brief? The brief relies solely on 793E offenses for
5 relevance.

6 MR. WHYTE: Yes, ma'am. And we think for the
7 793 --

8 THE COURT: I understand that. Why isn't --
9 I'm suddenly, once again, at oral argument now having
10 entirely new theories from both sides on why I should
11 take judicial notice of things. Why is that?

12 MR. WHYTE: No excuse, Your Honor.

13 THE COURT: All right. Well, let's capture
14 here in oral argument now, so we've got, are you
15 basically arguing to me that --

16 MR. WHYTE: Yes, ma'am. The fact that they
17 were released subsequent to the timeframe that PFC
18 Manning is charged with releasing the information or
19 compromising, that that is evidence to show that, that
20 evidence shows more likely than not that PFC Manning did
21 compromise the information during the alleged timeframe.

1 THE COURT: So with respect to each of these
2 pieces, the video, the combined information, the CIDNE
3 databases Iraq and Afghanistan, and the joint task force
4 Gitmo and the Army counter intelligence center reports
5 are all relevant to the 641 offenses and various
6 specifications that charge those data sets?

7 MR. WHYTE: Yes, ma'am.

8 THE COURT: Okay. What else, 641, 793E as
9 alleged?

10 MR. WHYTE: Again, it was not alleged in the
11 brief, specification one of charge two, the element that
12 PFC Manning caused intelligence to be published on the
13 Internet. The fact that the information was published on
14 the Internet is definitely relevant to that element.

15 THE COURT: Any other offense?

16 MR. WHYTE: No, Your Honor.

17 THE COURT: So the relevance then for this
18 first group of sets, A through E, WikiLeaks releases goes
19 to specification one of charge two, and then the 641 and
20 793E respective specifications.

21 MR. WHYTE: Yes, ma'am.

1 THE COURT: And that's it?

2 MR. WHYTE: Yes, ma'am.

3 The next set of facts, Your Honor, the salary
4 of service members and government employees. The court
5 has the testimony and through a stipulation of expected
6 testimony that the documents, the detainee assessments as
7 well as the global address list, they were prepared and
8 maintained by persons at these ranks, ranks on the GS
9 scale, so as far as the value of this information, the
10 value of producing this information is definitely
11 relevant.

12 THE COURT: So for those then.

13 MR. WHYTE: It's the 641, specification eight
14 and 16. The salary of service members at the grade of
15 E4, that's relevant to specification eight and 16.

16 There's a stipulation of expected testimony
17 from Mr. Jeffrey Motes that confirm that soldiers at this
18 rank helped create these detainee assessments and that's
19 at prosecution exhibit 131. And you also, Your Honor,
20 there was testimony from Chief Rouillard that service
21 members at the rank of E4 specialist were part of the

1 maintaining and producing the global address list, which
2 is relevant for the valuation of those databases.

3 And Your Honor, same thing with the
4 government employees, the GS-12 scale, GS-12 level. This
5 is actually only relevant to specification eight of
6 charge two. Again, in prosecution exhibit 131 the
7 stipulation of expected testimony from Mr. Motes, the
8 evidence is before the court that government employees at
9 the GS-12 rank helped create the detainee assessments.

10 Your Honor, moving to the next set of facts
11 in subparagraph hotel, we're asking the court to take
12 judicial notice of select paragraphs in Army regulation
13 25-1.

14 THE COURT: What's the relevance of that?
15 PFC Manning is not charged with that.

16 MR. WHYTE: Yes, ma'am. It goes to
17 specification four of charge three where the accused is
18 charged with using information system in a manner other
19 than its intended purpose. This regulation discusses
20 what are some of the authorized and unauthorized purposes
21 of information systems, so we think this would benefit

1 the court by reading this in conjunction with 25-2, the
2 paragraph that's already been taken judicial notice of to
3 assist the court in determining whether or not PFC
4 Manning used an information system in a manner other than
5 its intended purpose.

6 And, Your Honor, these facts, 25-1, and
7 again, Your Honor, I'm also including the definition of
8 information system which is an Army regulation 25-2 which
9 was put in the government's corrected copy, those are
10 also relevant to specification 16 of charge two where the
11 accused is charged with stealing, purloining or knowingly
12 converting the global address list. Again, these
13 portions of the regulation discuss information owned by
14 the United States government and generally why we don't
15 just release it. So it's relevant to that 641 offense as
16 well, Your Honor.

17 And then, Your Honor, lastly, it's termed as
18 the miscellaneous adjudicated facts. The defense --

19 THE COURT: Wait a minute. What about the
20 privacy program?

21 MR. WHYTE: Oh, Your Honor, I'm sorry. Same

1 reasons as the Army regulations. This document talks
2 about the government's policy to protect PII type
3 information and that it is a thing of value and that it
4 also is owned by the United States government, so we
5 would argue that it goes to specification four of charge
6 three as well as specification 16 of charge two. The
7 same reasons as outlined in the Army regulation 25-1 and
8 25-2.

9 THE COURT: Okay.

10 MR. WHYTE: Your Honor, lastly --

11 THE COURT: Thanksgiving is not objected to?

12 MR. TOOMAN: No. 4.

13 THE COURT: So I guess we're only left with
14 subparagraph kilo, lima and mike.

15 MR. WHYTE: Your Honor, we argue that these
16 facts, which are actually evident in prosecution exhibit
17 --

18 THE COURT: Mike is completely different from
19 kilo and lima, so let's go to kilo and lima.

20 MR. WHYTE: Yes, ma'am. Kilo, the term IS is
21 the top level Internet domain of Iceland.

1 THE COURT: Okay. How is that relevant?

2 MR. WHYTE: Your Honor, the accused in his
3 chats with Mr. Julian Assange specifically reference this
4 term.

5 THE COURT: Can you show me that? And that
6 would be prosecution exhibit what?

7 MR. WHYTE: 123, Your Honor.

8 THE COURT: May I see prosecution exhibit
9 123?

10 MR. WHYTE: It's on page five, Your Honor.

11 THE COURT: Okay. Let me get the exhibit.

12 All right. I'm looking at prosecution
13 exhibit 123 at page five.

14 MR. WHYTE: Yes, ma'am. At time 6:19:16.

15 THE COURT: Okay.

16 MR. WHYTE: Then, Your Honor, so we think
17 that defining what this actually means helps with the
18 court to understand this prosecution exhibit.

19 Also, Your Honor, paragraph lima we identify
20 four individuals and we're asking the court to take
21 judicial notice of their positions in the Icelandic

1 government.

2 THE COURT: How is that relevant?

3 MR. WHYTE: Again, Your Honor, the accused in
4 the -- with the first three people, Your Honor, in
5 prosecution exhibit 39 which is the volumes dot TXT
6 document, the files of these people's names is actually
7 included in there.

8 THE COURT: May I see that exhibit, please?
9 Is that a classified exhibit?

10 MR. WHYTE: It is not, ma'am.

11 THE COURT: Okay. All right. I see what
12 you're talking about. All right.

13 MR. WHYTE: Then, Your Honor, the fourth
14 person --

15 THE COURT: Hold on just a minute.
16 Prosecution exhibit 39 been admitted?

17 MR. MORROW: Ma'am, the admitted version of
18 that screenshot is prosecution exhibit 127. It's the
19 same information.

20 THE COURT: Why is it marked as an exhibit
21 twice?

1 MR. MORROW: For the opening statement,
2 ma'am, we marked it as an exhibit for display, and then
3 that same information was, we put line numbers on it, so
4 that's line seven so we can refer to it during testimony
5 so that changes sort of the length --

6 THE COURT: All right. Do both sides agree
7 that prosecution exhibit 127 as admitted is the same as
8 prosecution exhibit 39 for identification with respect
9 except with respect to the line numbers?

10 MR. TOOMAN: Yes, ma'am.

11 THE COURT: So let's talk about prosecution
12 exhibit 127 as the one that's been admitted. Okay. I
13 see the three names are there. Okay.

14 I'm sorry. Once again, may I see prosecution
15 exhibit 39 again?

16 Counsel, I'm a little confused. Both sides
17 have agreed that these two exhibits are the same, but
18 they're not in the same order, so I guess I'm confused.
19 If you look at the names you'll see that.

20 MR. FEIN: Your Honor, I'm holding
21 prosecution exhibit 39 for identification and prosecution

1 exhibit 127. The court heard testimony from Mr. Mark
2 Johnson that when he was presented prosecution exhibit
3 127 he explained that there were line numbers from the
4 document he created. This document is in alphabetical
5 order, or if there's a number it's number order. The
6 information is identical, it's just the order in which it
7 falls is different.

8 THE COURT: Okay. Thank you. All right.
9 Anything further with K and L?

10 MR. WHYTE: Yes, ma'am. The last person in
11 paragraph L, that person is not in prosecution exhibit
12 127, but that person is identified by the accused in the
13 Intelink charts, the summary, that's a classified
14 prosecution exhibit, but this person was a search term
15 used by the accused. And, Your Honor, I can give you the
16 line number, it is a classified exhibit, I can give you
17 the line number that specifically references this person.

18 THE COURT: Which exhibit and which line?

19 MR. WHYTE: It's going to be prosecution
20 exhibit 49, and, ma'am, it's line number 578 through 581.

21 THE COURT: All right.

1 MR. WHYTE: Sorry, Your Honor. It's actually
2 prosecution exhibit 81.

3 THE COURT: So it's not 49, it's 81?

4 MR. WHYTE: Yes, ma'am. Sorry.

5 THE COURT: I think you might want to send
6 someone out with your person who was going to retrieve
7 prosecution exhibit 49.

8 All right. Let's move on to M.

9 MR. WHYTE: Yes, ma'am.

10 THE COURT: I have a question about M. Your
11 exhibit here, your enclosure 13 is basically acronyms for
12 PE 30 with time, page, context and translation. How do I
13 have any idea based on what you've presented that this is
14 an adjudicative fact that can be found, that I can find
15 for judicial notice?

16 MR. WHYTE: Your Honor, we would argue that
17 this is commonly used acronyms for people that do engage
18 in Internet chat with other people, and these are just
19 commonly used terms in Internet chat communications.

20 THE COURT: Defense, do you stipulate to
21 that?

1 MR. TOOMAN: No, ma'am.

2 THE COURT: How would I have any idea based
3 on this that that's true?

4 MR. WHYTE: One second, please.

5 (DISCUSSION OFF THE RECORD.)

6 MR. WHYTE: Ma'am, this information was
7 compiled from multiple resources that we can provide the
8 court.

9 THE COURT: If you want judicial notice of M,
10 I highly suggest you do that.

11 MR. WHYTE: I will, yes, ma'am, do that.

12 Ma'am, no further questions?

13 THE COURT: No. I think I've asked them.
14 Thank you.

15 MR. FEIN: Ma'am, just to correct one thing
16 that unfortunately something I said earlier, although the
17 United States did in its theory of relevance not put in
18 for the first category of WikiLeaks releases
19 specification one of charge two, all of the 641s were
20 briefed in there along with the 793 offenses. So these
21 on page three, page four.

1 THE COURT: All right. So then the only one
2 that's added then is specification one of charge two.

3 MR. FEIN: Yes, ma'am. That was not raised
4 in the brief.

5 THE COURT: Okay. Captain Tooman.

6 Before you begin, let me ask you a question.
7 Your objections to all of these are relevance. Do you
8 have any objection -- should I find them relevant, is
9 there any objections to these being adjudicative facts?

10 MR. TOOMAN: Well, I guess the one we just
11 talked about.

12 THE COURT: That one aside.

13 MR. TOOMAN: That one aside, no, ma'am.

14 THE COURT: Okay.

15 MR. TOOMAN: So we'll start with the, I guess
16 that first group of five, alpha through echo.

17 THE COURT: Okay.

18 MR. TOOMAN: I guess the first point we would
19 make is the actions of WikiLeaks are independent from the
20 actions of PFC Manning.

21 THE COURT: Well, with respect to

1 specification one of charge two, isn't one of the
2 elements that they have that PFC Manning caused to be
3 published; the fact that they are published would go
4 towards that offense?

5 MR. TOOMAN: Yes. Can I have a moment, Your
6 Honor?

7 THE COURT: Yes.

8 (DISCUSSION OFF THE RECORD.)

9 MR. TOOMAN: Again, Your Honor, we would
10 just, we would, our position would be that that's an
11 intervening cause. What's relevant here is what PFC
12 Manning did. PFC Manning, if he gave it to WikiLeaks,
13 that's what the government would need to prove. Again, I
14 guess this would go back to our argument on spec one,
15 charge one, where we didn't believe that the government
16 had to prove actual receipt by the enemy. We would have
17 a similar position here.

18 THE COURT: All right. I understand your
19 position.

20 MR. TOOMAN: In addition, we don't believe
21 it's relevant at all to 793. Again, the actions of

1 WikiLeaks don't impact whether or not a piece of
2 information is closely held. The government's offered
3 no-- there's no evidence before this court that WikiLeaks
4 only publishes things that are closely held. There's no
5 evidence before this court that WikiLeaks understands the
6 definition employed by the United States government with
7 regards to closely held and then employs that in their
8 publishing decisions.

9 THE COURT: Wouldn't an organization by the
10 name of WikiLeaks lead to the inference that it is
11 publishing leaks?

12 MR. TOOMAN: That could be an inference, Your
13 Honor, but an inference wouldn't be proper for judicial
14 notice. So if the government wanted you to draw that
15 inference, they could certainly welcome --

16 THE COURT: No, no, no. I agree we're
17 talking relevance now is your objection. You're saying
18 it's not relevant because WikiLeaks, there's no evidence
19 before the court that WikiLeaks only publishes leaks and
20 whether they know of a technical definition of closely
21 held. You know, relevance doesn't mean it has to prove

1 everything, it just means it has to be a piece of the
2 pie.

3 MR. TOOMAN: Sure. Our position is that
4 closely held is a term of art.

5 THE COURT: I agree.

6 MR. TOOMAN: And WikiLeaks, for their actions
7 to be relevant, they would have to understand that. The
8 fact that they did it, they could publish anything. They
9 publish I would imagine lots of things that wouldn't meet
10 the definition of closely held. And so the fact, the
11 mere publishing of it doesn't make it more likely than
12 not that this particular piece of information or that
13 particular piece of information was closely held.
14 Closely held is something that is determined by the
15 government.

16 THE COURT: Okay. Well, it will be
17 determined by me in this case, but okay.

18 MR. TOOMAN: Yes, ma'am.

19 Or the actions of the government and the way
20 the government comports themselves with respect to
21 certain information is how we figure out whether or not,

1 and you will figure out whether or not something is
2 closely held, not by what WikiLeaks does or doesn't do
3 with it.

4 And with respect to the 641s, Your Honor,
5 it's our belief this isn't going to help you determine
6 whether or not these things have value at all. And we
7 don't believe the government's articulated how it would
8 help you determine value.

9 And the government has to prove that these
10 were worth more than a thousand dollars, and the fact
11 that WikiLeaks published it doesn't help you assign any
12 dollar value.

13 THE COURT: Doesn't the fact that WikiLeaks
14 has the information, the fact that they published it
15 means that they necessarily have it, isn't that relevant
16 to show that PFC Manning stole it?

17 MR. TOOMAN: Not necessarily, Your Honor.
18 There's no evidence before this court that the
19 government's been denied their use of this information,
20 and that's been a theme throughout the witness testimony
21 is that the government's always had the information and

1 so --

2 THE COURT: Is that, in the legal theory the
3 defense is going to have down the road is that that's a
4 requirement for a 641 offense?

5 MR. TOOMAN: We think that you would have to
6 show some interference with the charged thing, and that,
7 the fact that WikiLeaks has posted it doesn't demonstrate
8 any interference.

9 THE COURT: All right.

10 MR. TOOMAN: With respect to F and G, Your
11 Honor, again, we would object based on relevance. Based
12 on what this request is calling for the court to do is
13 draw inferences. We've heard some testimony that some
14 people worked on this, this was their rank, but we didn't
15 hear any testimony about how much time they were actually
16 spending on it or how much time they were spending on
17 this with relation to other things.

18 You heard some general testimony that, yeah,
19 generally we've got E4s working on this or Mr. Motes is a
20 GS-12, but you don't have any testimony as to how much
21 time they were actually dedicating to these things. And

1 so what the government's asking you to do is infer and
2 extrapolate yourself the value of these things, and
3 that's the government's burden is to show you the value
4 of these things.

5 THE COURT: Even if that's true, your
6 objection here is that this, the salary of an E4 and base
7 salary of government employees is not relevant.
8 Understanding that the government would, the government's
9 position would be that people worked a certain amount of
10 hours, therefore times whatever this salary range is
11 equals X amount of value. Why would the salary range not
12 be relevant?

13 MR. TOOMAN: We think that this is testimony
14 that should be brought out through the witness.

15 THE COURT: Why? I mean this is one of
16 these, you've already told me you're not objecting to the
17 adjudicative fact. This is what the salary of an E4 is.
18 I mean is that debatable?

19 MR. TOOMAN: No, it's not, Your Honor.

20 THE COURT: That's what I'm taking judicial
21 notice of.

1 (INTERRUPTION IN VIDEO AND AUDIO.)

2 THE COURT: Level of E4 is in X period of
3 time.

4 MR. TOOMAN: Okay. May I have a moment, Your
5 Honor?

6 THE COURT: Yes.

7 (DISCUSSION OFF THE RECORD.)

8 MR. TOOMAN: Your Honor, I guess the other
9 piece of the relevance would be the I guess tying -- we
10 would agree that in 2004 or whatever year an E4 made X
11 amount of dollars, but it's tying that value with what
12 those people actually did at that time and we don't think
13 that this is relevant for that. That's what's important
14 for the court.

15 THE COURT: I understand the defense's
16 position.

17 MR. TOOMAN: So with H and I, again, Your
18 Honor, we don't think either of these assist the court in
19 making any determination as to the value. Again, PFC
20 Manning is charged with stealing, purloining or
21 converting things worth more than a thousand dollars.

1 These definitions for which the government has requested
2 judicial notice don't assist you in assessing a dollar
3 value to the information.

4 With respect to --

5 THE COURT: Well, the government's relying on
6 specification 4 of charge two, and specification 16 of
7 charge two for those, for H and I. Right?

8 MR. WHYTE: (INAUDIBLE).

9 THE COURT: So what is the basis for that
10 it's not relevant to those specifications? I don't think
11 they're arguing that it's doing anything about value.

12 MR. TOOMAN: Can I have a moment, Your Honor?

13 THE COURT: Yes.

14 (DISCUSSION OFF THE RECORD.)

15 MR. TOOMAN: Your Honor, specification 16 is
16 a 641 offense.

17 THE COURT: It would be a thing of value, not
18 the value itself. Is that what you're arguing, to show
19 that it's a thing of value?

20 MR. TOOMAN: Right. We don't think that it
21 is. We think that that would call for the court to make

1 an inference from the definition that it is a thing of
2 value. It doesn't say an information system is a thing
3 of value. That's an inference.

4 THE COURT: Isn't that the purpose of
5 relevant evidence, to have the court draw inferences from
6 the evidence?

7 MR. TOOMAN: Yes. But here we don't think
8 this is proper for judicial notice because the definition
9 doesn't help.

10 THE COURT: That's where I'm having trouble
11 with your argument. The judicial notice is basically
12 this is what it is. It's an adjudicative fact that AR
13 25-2 says X. What inferences the court draws from that
14 depends on what other evidence is presented, how the
15 parties argue their case, etcetera. So I'm confused a
16 little bit. The judicial notice, is your argument to me
17 that this evidence is not relevant in any way coupled
18 with other things for the government to make an argument
19 that the court should draw whatever inference it's trying
20 to draw with respect to those specifications?

21 MR. TOOMAN: Specifically with regard to AR

1 25-1 because PFC Manning is not charged with AR 25-1, and
2 with respect to the definition from AR 25-2 which was
3 originally offered to the court under AR 25-1, those are
4 different definitions.

5 THE COURT: There's two different
6 definitions. There's different definitions of
7 information systems in 25-1 and 25-2?

8 MR. TOOMAN: Yes, ma'am. As well as in other
9 Army AR 25-400-2 has a definition that's different. So
10 then we would say the probative value, the Army doesn't
11 seem to be able to get on the same page as to what an
12 information system is, and so we would then say the
13 probative value of this particular definition is not very
14 high for the court.

15 THE COURT: All right. So when we recess the
16 court, then the defense will be getting me the
17 definitions of information system in these other various
18 regulations.

19 MR. TOOMAN: I believe you have 25-1, we'll
20 be happy to get you another copy, but that was the
21 attachment to the original. Just so I make sure.

1 THE COURT: That's all right. If I have it,
2 I don't need another one. Which enclosure is it, do you
3 remember?

4 MR. WHYTE: It's enclosure eight, ma'am.

5 THE COURT: And where in enclosure eight does
6 it define information systems just so I can double-check
7 it?

8 MR. WHYTE: In enclosure eight, ma'am, the
9 definition of information system is the last page.

10 MR. TOOMAN: Which would be --

11 THE COURT: Page what? I see. Okay.

12 MR. TOOMAN: Ma'am, I can give you a copy of
13 25-1.

14 THE COURT: I have it.

15 MR. TOOMAN: You have it. Okay.

16 THE COURT: All right. I see what you're
17 talking about. But I would appreciate the 25-400-2. I
18 don't need the whole regulation.

19 MR. TOOMAN: Yes, ma'am. We'll just give you
20 the definition.

21 Moving on to K and L, again, we don't believe

1 the domain of Iceland is relevant. It doesn't make
2 anything more or less likely.

3 THE COURT: Well, in the chat exhibit,
4 prosecution exhibit 30 -- I'm sorry -- prosecution
5 exhibit 123. If they actually used the term dot I S,
6 wouldn't it be helpful for the court to know what it was?

7 MR. TOOMAN: If you tell us it is, Your
8 Honor, then I guess it would be. I think we can agree it
9 is what it is, but we don't think it makes a fact more
10 likely than not.

11 THE COURT: Okay.

12 MR. TOOMAN: I guess with respect to
13 specification two of charge one, I guess what the
14 government cited, the fact that that is --

15 THE COURT: As I understand what the
16 government is offering these things for is to explain to
17 the court when they look at the exhibit what it is.
18 Otherwise, how would the court know?

19 MR. TOOMAN: Sure. Understood, Your Honor.

20 THE COURT: Do you disagree with that?

21 MR. TOOMAN: If that is what the government

1 is offering it for, then we would agree that it is, for
2 the purpose of helping the court understand the chat,
3 that I S means Iceland, we would agree with that.

4 THE COURT: And the same thing for the four
5 individuals?

6 MR. TOOMAN: That we would say isn't
7 relevant. Who these people are doesn't, it just isn't
8 relevant to whether or not PFC Manning gave this
9 information to WikiLeaks.

10 THE COURT: Okay.

11 MR. TOOMAN: We would say that's true for K
12 as well, I S, but we would agree that it is the domain
13 for Iceland. But it doesn't make it any more or less
14 likely that PFC Manning gave these things to WikiLeaks or
15 any other unauthorized person. It doesn't make it any
16 more or less likely that they have less value. It
17 doesn't make any more or less to his state of mind or
18 intent. Our position is it's just not relevant. And I
19 believe we've already discussed M, Your Honor.

20 THE COURT: All right. M, should the
21 government get anything further to the court, M will have

1 to be further addressed.

2 MR. TOOMAN: Yes, ma'am.

3 THE COURT: All right. Thank you.

4 Anything else from the government?

5 MR. WHYTE: No, ma'am.

6 THE COURT: All right. Is there anything
7 else we need to address today?

8 MR. COOMBS: No, Your Honor.

9 MR. FEIN: No, ma'am.

10 THE COURT: All right. The court will take
11 this issue under advisement. The court still understands
12 we owe you or I owe you a ruling on the other evidentiary
13 issue that is outstanding and you'll have that one as
14 well. That was prosecution exhibits 31, 32 and 109, the
15 admissibility of those. And if I'm correct we're going
16 to be proceeding with the taking of evidence tomorrow at
17 0930.

18 MR. FEIN: Yes, ma'am.

19 MR. COOMBS: Yes, ma'am.

20 THE COURT: Court is in recess until tomorrow
21 at 0930.

	25:5,13;26:2;35:17 admissibility (1) 64:15	appellate (8) 5:19;6:3,7;8:21;9:3,4; 11:2,3	authorized (1) 41:20
A			
able (1) 60:11	admit (3) 10:10,18;28:10	appreciate (1) 61:17	available (1) 4:18
above (1) 30:12	admitted (6) 28:4,11;45:16,17;46:7,12	appropriate (1) 19:14	aviation (1) 13:13
absence (1) 10:18	Adrian (2) 18:11;19:6	approximately (1) 4:16	aware (8) 12:20;13:1;17:18;27:18; 28:17;29:18;30:15,20
absent (2) 4:7,10	adversary (2) 23:6;25:20	AR (6) 59:12,21;60:1,2,3,9	
access (1) 7:17	advised (2) 6:9;21:2	argue (8) 8:11;16:16;24:8;32:1; 43:5,15;48:16;59:15	
according (1) 25:21	advisement (2) 5:12;64:11	arguing (4) 21:20;38:15;58:11,18	
account (3) 4:3;5:21;10:5	Advocate (3) 13:14,19;24:15	argument (13) 5:8;11:6;19:20;21:1; 26:7;31:11,21;38:9,14; 51:14;59:11,16,18	
accurate (6) 6:18,21;16:2,12;18:16; 35:13	Afghanistan (1) 39:3	Army (11) 13:12,15,20;24:16;39:4; 41:12;42:8;43:1,7;60:9,10	
accused (6) 41:17;42:11;44:2;45:3; 47:12,15	again (30) 4:5;5:1,13;8:19;9:20; 10:5;17:17;22:1;24:21; 26:4;29:20;30:5;33:4,6; 34:13;38:9;39:10;41:6; 42:7,12;45:3;46:14,15;51:9, 13,21;55:11;57:17,19;61:21	arose (1) 7:3	
acronyms (2) 48:11,17	against (1) 18:5	arrived (1) 5:3	
Act (1) 31:12	ago (1) 4:9	art (1) 53:4	
actions (5) 50:19,20;51:21;53:6,19	agree (12) 15:14;17:21;28:10;35:19; 46:6;52:16;53:5;57:10; 62:8;63:1,3,12	articulated (1) 54:7	
activity (1) 30:12	agreed (1) 46:17	aside (2) 50:12,13	
actual (3) 24:11;31:11;51:16	ahead (3) 24:9;27:12;28:10	Assange (1) 44:3	
actually (16) 15:16,20;23:10;28:10; 33:5,16;34:9;41:5;43:16; 44:17;45:6;48:1;55:15,21; 57:12;62:5	alleged (5) 27:5;38:2,21;39:9,10	assertion (3) 14:14;20:19;21:6	
add (2) 7:20;8:20	alleging (1) 37:1	assessing (1) 58:2	
added (3) 5:7;8:21;50:2	Allen (1) 10:9	assessment (3) 14:20;20:16;24:13	
addition (2) 37:14;51:20	allow (1) 27:8	assessments (3) 40:6,18;41:9	
additional (1) 12:12	along (2) 16:11;49:20	assign (1) 54:11	
Additionally (2) 7:16;28:19	Alpha (4) 9:13,14,21;50:16	assist (3) 42:3;57:18;58:2	
address (9) 8:6;10:20;14:17;19:15; 36:1;40:7;41:1;42:12;64:7	alphabetical (1) 47:4	assumption (1) 9:5	
addressed (1) 64:1	although (2) 4:18;49:16	attachment (1) 60:21	
addressing (1) 31:10	always (1) 54:21	attention (3) 13:10;24:11;27:19	
adjudicated (1) 42:18	amount (3) 56:9,11;57:11	AUDIO (1) 57:1	
adjudicative (4) 48:14;50:9;56:17;59:12	analysis (1) 24:17	authenticate (2) 33:13,14	
Admiral (21) 11:14;12:13;13:3,14,18; 14:1,4,15,19;20:20;21:19; 22:5;23:6,9,11;24:11,12;	Apache (7) 11:13,17;15:6;19:3,4; 20:17;24:14	authentication (1) 16:4	
		authenticity (1) 31:14	
		authority (1) 9:7	

<p>calling (1) 55:12</p> <p>can (20) 7:9;16:8,11,12;19:13,15; 20:12;23:5;44:5;46:4; 47:15,16;48:14,14;49:7; 51:5;58:12;61:6,12;62:8</p> <p>Captain (10) 4:10,10;11:11;16:6;17:6; 18:21;19:10;31:1,6;50:5</p> <p>capture (1) 38:13</p> <p>case (5) 19:2;33:8,11;53:17;59:15</p> <p>category (2) 21:13;49:18</p> <p>cause (2) 25:3;51:11</p> <p>caused (2) 39:12;51:2</p> <p>causing (1) 37:7</p> <p>Cav (1) 24:13</p> <p>CD (5) 27:19;28:15;30:17;32:1,9</p> <p>CENTCOM (9) 14:16;20:16;24:12;32:5, 8,14,14;33:18;35:1</p> <p>CENTCOM's (1) 27:5</p> <p>center (3) 4:13;10:5;39:4</p> <p>certain (2) 53:21;56:9</p> <p>certainly (2) 22:14;52:15</p> <p>chambers (1) 7:21</p> <p>change (1) 6:15</p> <p>changes (2) 15:7;46:5</p> <p>charge (18) 37:7,11,13;39:6,11,19; 41:6,17;42:10;43:5,6; 49:19;50:2;51:1,15;58:6,7; 62:13</p> <p>charged (9) 37:7,18;38:18;41:15,18; 42:11;55:6;57:20;60:1</p> <p>charges (1) 11:16</p> <p>charts (1) 47:13</p> <p>chat (5) 28:20;48:18,19;62:3;63:2</p> <p>chats (4) 18:10;19:5,20;44:3</p> <p>Chavez (1) 4:6</p> <p>Chief (4) 13:5,11;25:15;40:20</p>	<p>CIDNE (1) 39:2</p> <p>circumstances (1) 34:7</p> <p>cited (1) 62:14</p> <p>claiming (1) 37:16</p> <p>classification (11) 11:14;20:16;23:10;24:13, 16,19,20;25:2,15;26:3,5</p> <p>classified (13) 7:6,7,8,14;8:3;12:2,5; 23:13;24:17;26:8;45:9; 47:13,16</p> <p>cleaner (1) 10:2</p> <p>closed (1) 7:15</p> <p>closely (13) 11:17;12:10;37:5,10; 52:2,4,7,20;53:4,10,13,14; 54:2</p> <p>closest (1) 14:19</p> <p>clue (1) 25:13</p> <p>coalition (1) 21:17</p> <p>co-counsel (1) 26:6</p> <p>combined (1) 39:2</p> <p>command (1) 9:5</p> <p>commander (1) 9:5</p> <p>commonly (3) 15:21;48:17,19</p> <p>communications (1) 48:19</p> <p>community (1) 15:21</p> <p>compatriots (1) 34:18</p> <p>compel (1) 25:11</p> <p>compiled (1) 49:7</p> <p>complete (1) 6:5</p> <p>completely (2) 37:2;43:18</p> <p>comports (1) 53:20</p> <p>compromise (1) 38:21</p> <p>compromised (1) 38:1</p> <p>compromising (1) 38:19</p> <p>conducted (1) 11:14</p>	<p>conference (3) 5:1;6:9;7:4</p> <p>conferences (1) 5:2</p> <p>confirm (4) 16:21;33:5;34:13;40:17</p> <p>confused (3) 46:16,18;59:15</p> <p>conjecture (1) 25:12</p> <p>conjunction (2) 30:16;42:1</p> <p>consistent (1) 13:3</p> <p>contain (3) 23:14;25:14,17</p> <p>contained (1) 7:7</p> <p>contains (3) 13:12;23:16;24:21</p> <p>contents (1) 32:4</p> <p>context (2) 30:11;48:12</p> <p>CONTINUES (1) 24:6</p> <p>convening (1) 9:6</p> <p>converting (3) 37:19;42:12;57:21</p> <p>COOMBS (6) 7:2,12;8:9,14;64:8,19</p> <p>copies (3) 6:17,20;10:17</p> <p>copy (8) 6:13,16;9:19;11:1;28:21; 42:9;60:20;61:12</p> <p>corrected (6) 6:13,16,20;9:18;11:1; 42:9</p> <p>correction (1) 4:8</p> <p>correspondence (4) 13:18;14:2,18;17:10</p> <p>cost (1) 24:16</p> <p>Counsel (4) 4:21;5:3;24:8;46:16</p> <p>counter (1) 39:4</p> <p>coupled (1) 59:17</p> <p>Court (240) 4:2,2,5,6,7,12,20;5:11,12; 6:8,10;7:3,5,9,14,17,19;8:5, 10,15,15,17,17,18,19;9:11, 19;10:13,15,18;11:5,9,19; 12:6,11,17;13:5,8;14:8,12, 21;15:3,9,11,18;16:1,6,15; 17:1,3,6,13,14,16,20;18:3,5, 8,12,18;19:7,10,17,21;20:2, 7,8,11,12,15;21:1,2,12;22:3, 9,14,20;23:12,18;24:1,3,3,</p>	<p>9:25;18;26:10,20;27:2,7,20; 28:1,5,9;29:2,7,10,16;30:1, 7,21;31:4,6,17,19;32:7,12, 17;33:1,2,9,11,21;34:7,9,11, 15;35:3,4,7,16,19,21;36:5,9, 13,16,20;37:12;38:3,8,13; 39:1,8,15,17;40:1,4,12; 41:8,11,14;42:1,3,19;43:9, 11,13,18;44:1,5,8,11,15,18, 20;45:2,8,11,15,20;46:6,11; 47:1,8,18,21;48:3,5,10,20; 49:2,8,9,13;50:1,5,12,14,17, 21;51:7,18;52:3,5,9,16,19; 53:5,16;54:13,18;55:2,9,12; 56:5,15,20;57:2,6,14,15,18; 58:5,9,13,17,21;59:4,5,10, 13,19;60:3,5,14,15,16;61:1, 5,11,14,16;62:3,6,11,15,17, 18,20;63:2,4,10,20,21;64:3, 6,10,10,11,20,20</p> <p>court-martial (1) 9:7</p> <p>courtroom (1) 4:17</p> <p>court's (2) 18:14;24:11</p> <p>create (2) 40:18;41:9</p> <p>created (1) 47:4</p> <p>cross (1) 14:6</p> <p>CW5 (4) 12:15;21:3;22:21;23:18</p> <p>CZ (1) 28:15</p>
D			
<p>damage (3) 25:3,3,4</p> <p>data (2) 21:17;39:6</p> <p>databases (2) 39:3;41:2</p> <p>debatable (1) 56:18</p> <p>decisions (1) 52:8</p> <p>declaration (1) 21:5</p> <p>decline (3) 22:4,9,10</p> <p>dedicating (1) 55:21</p> <p>defense (45) 5:10;6:2,10,16;7:9,10,13, 16;9:19;10:18;11:10;13:16; 15:6;16:2,18;17:21;18:6; 19:13;20:10,15;21:1,22:4,6, 11;23:8;25:9,10;26:11,15; 27:2,8;31:9,17,21;33:7,10, 12;35:5,8;36:2,21;42:18;</p>			

<p>48:20;55:3;60:16 defense's (5) 6:4,13;11:2;14:12;57:15 define (1) 61:6 defining (1) 44:17 definitely (2) 39:14;40:10 definition (11) 42:7;52:6,20;53:10;59:1, 8:60;2:9,13;61:9,20 definitions (5) 58:1;60:4,6,17 definitive (1) 21:8 definitively (1) 23:16 deliberations (1) 7:18 demonstrate (1) 55:7 denied (1) 54:19 depends (1) 59:14 describes (1) 21:14 detainee (3) 40:6,18;41:9 determination (1) 57:19 determine (3) 24:16;54:5,8 determined (2) 53:14,17 determining (1) 42:3 difference (1) 16:7 different (7) 30:2;43:18;47:7;60:4,5,6, 9 direct (1) 27:18 directs (1) 24:10 disagree (1) 62:20 discuss (2) 5:15;42:13 discussed (3) 7:21;8:7;63:19 discusses (2) 13:11;41:19 DISCUSSION (9) 22:15;24:2,6;31:5;34:20; 49:5;51:8;57:7;58:14 display (1) 46:2 District (1) 9:6 division (1)</p>	<p>24:13 document (5) 9:13;43:1;45:6;47:4,4 documents (5) 11:4;37:4,9,19;40:6 dollar (2) 54:12;58:2 dollars (3) 54:10;57:11,21 domain (3) 43:21;62:1;63:12 Donegan (16) 11:15;12:13;13:3,14,19; 14:2,5,19;21:20;22:6;23:9; 24:11,12;25:13;26:2;35:17 Donegan's (4) 20:20;23:7,11;25:5 dot (2) 45:5;62:5 double (1) 36:9 double-check (1) 61:6 down (1) 55:3 drafted (1) 17:18 draw (5) 52:14;55:13;59:5,19,20 draws (1) 59:13 during (3) 7:18;38:21;46:4</p>	<p>else (8) 8:5;10:20;19:17;36:1; 37:15;39:8;64:4,7 Elten (1) 4:10 emailed (1) 6:10 embarrass (1) 21:17 employed (1) 52:6 employees (4) 40:4;41:4,8;56:7 employs (1) 52:7 enclosure (10) 15:9,12,13;16:19;35:13; 48:11;61:2,4,5,8 enclosures (3) 31:11;32:19;35:5 enemy (1) 51:16 engage (1) 48:17 engagement (1) 28:15 entail (1) 23:13 entire (3) 21:7;24:14;26:16 entirely (1) 38:10 equals (1) 56:11 error (2) 6:12,12 Essentially (1) 11:15 establish (2) 34:14;37:3 established (1) 37:1 establishes (1) 18:2 etcetera (3) 28:15,15;59:15 Even (1) 56:5 event (3) 21:14;30:10;32:11 eventually (1) 32:5 evidence (34) 5:14;12:1,2;17:13;18:3; 27:4,17;28:1;30:19;32:6,7, 13;33:7,10,17,20;34:13; 36:7,11;37:3,4,21;38:19,20; 41:8;52:3,5,18;54:18;59:5, 6,14,17;64:16 evident (1) 43:16 evidentiary (1) 64:12</p>	<p>exactly (2) 16:18;25:1 examine (1) 14:6 except (1) 46:9 exceptions (1) 4:6 excuse (2) 25:9;38:12 exhibit (65) 5:19;6:3,7;9:3,4,13,14,20; 10:3,6,6,10;11:2,3;12:15; 13:8;16:8;17:15;18:8;19:9; 21:3;23:2;27:10,14,14,19; 28:11,14,19;30:16;35:12; 40:19;41:6;43:16;44:6,8,11, 13,18;45:5,8,9,16,18,20; 46:2,7,8,12,15,21;47:1,2,11, 14,16,18,20;48:2,7,11;62:3, 4,5,17 exhibits (7) 8:21;9:1;10:11,12,16; 46:17;64:14 exist (2) 24:18;26:4 existed (1) 25:8 expected (11) 7:18;8:1;9:15,16;10:9; 14:9;22:20;25:16;40:5,16; 41:7 explain (1) 62:16 explained (1) 47:3 explicitly (1) 29:14 extrapolate (1) 56:2</p>
	E		F
	<p>E4 (6) 40:15,21;56:6,17;57:2,10 E4s (1) 55:19 earlier (1) 49:16 easier (2) 23:5;25:20 easily (2) 16:10,13 echo (1) 50:16 edited (1) 15:13 effective (1) 9:7 eight (7) 13:11;40:13,15;41:5; 61:4,5,8 either (1) 57:18 element (3) 37:10;39:11,14 elements (2) 18:2;51:2 eleven (1) 4:15</p>		<p>fact (32) 7:10;14:15;18:16;20:7, 19;21:6;23:14,16;24:17; 25:16;27:1;31:14;32:4,19; 33:5;35:2;37:8,20;38:16; 39:13;48:14;51:3;53:8,10; 54:10,13,14;55:7;56:17; 59:12;62:9,14 factors (2) 26:8,9 facts (9) 15:19;34:10;36:17;40:3; 41:10;42:6,18;43:16;50:9 factual (1) 26:17 factually (1) 24:21 falls (1) 47:7 far (6)</p>

23:11;27:1;32:9,21; 33:16;40:9 Farah (2) 17:10;18:20 Fein (27) 4:3,4,14;5:15,18;7:1,20; 8:8,13,20;9:2,12;10:21; 23:20;24:5,7,10;25:21; 26:14;28:4,6,12;46:20; 49:15;50:3;64:9,18 few (1) 21:9 figure (2) 53:21;54:1 file (1) 6:16 filed (9) 5:9,10,11;6:13;11:10; 12:21;13:1;25:11;31:14 files (1) 45:6 find (3) 19:14;48:14;50:8 finder (1) 7:10 fine (1) 16:9 Finkel (1) 29:6 first (20) 9:3;11:11,16;14:13; 19:12;20:2,10;21:9,18; 22:4;24:13;26:14;27:18; 36:19;37:14;39:18;45:4; 49:18;50:16,18 five (6) 36:21;37:9,14;44:10,13; 50:16 FOI (1) 30:12 FOIA (32) 17:10;18:20;19:2,3;27:3, 5,18;28:16,17,18;29:11,13, 16,17,20;30:15,17,20;32:1, 5,11,15,19,20;33:4,14,16, 18;34:1,3;35:1,11 follow (1) 16:11 following (1) 4:6 force (1) 39:3 forget (1) 21:10 forgot (1) 4:9 forth (2) 27:17;31:9 forthright (1) 14:2 forward (2) 13:4;30:11 found (1)	48:14 four (5) 41:17;43:5;44:20;49:21; 63:4 fourth (1) 45:13 free (2) 33:7,10 freedom (2) 30:13;31:12 front (1) 23:2 further (5) 36:10;47:9;49:12;63:21; 64:1 future (1) 21:15 G gave (3) 51:12;63:8,14 general (6) 9:6;13:14,19,20;21:15; 55:18 generally (2) 42:14;55:19 Gitmo (1) 39:4 given (1) 26:8 global (3) 40:7;41:1;42:12 goes (6) 22:1;25:18;29:8;39:18; 41:16;43:5 good (1) 14:6 government (56) 6:6,9,9;7:5,5,15;11:20,21; 13:2;14:4;15:1,7,11;16:15; 17:2;18:15;19:11;20:2; 22:9,12;24:8;27:16;28:2; 31:13;32:17;33:15;34:19; 35:3,9,10,11,13;37:15;40:4; 41:4,8;42:14;43:4,45:1; 51:13,15;52:6,14;53:15,19, 20;54:9;56:7,8;58:1;59:18; 62:14,16,21;63:21;64:4 government's (24) 5:21;6:1,3;10:21;11:18; 12:4,21;17:12,18;20:18; 21:4;26:21;30:19;32:18; 42:9;43:2;52:2;54:7,19,21; 56:1,3,8;58:5 grade (1) 40:14 Granahi (2) 17:11;18:21 grant (2) 5:16,19 grave (1) 25:4	group (2) 39:18;50:16 grouping (1) 37:14 GS (1) 40:8 GS-12 (4) 41:4,4,9;55:20 guess (12) 17:9;43:13;46:18;50:10, 15,18;51:14;57:8,9;62:8,12, 13 guide (1) 23:10 H hand (1) 27:13 happen (1) 33:5 happened (3) 29:19;33:16;34:9 happy (2) 24:3;60:20 Harward (1) 14:15 hear (3) 26:15;36:5;55:15 heard (3) 47:1;55:13,18 hearing (2) 16:19;36:10 hearsay (1) 22:10 held (13) 11:17;12:10;37:5,10; 52:2,4,7,21;53:4,10,13,14; 54:2 help (4) 54:5,8,11;59:9 helped (2) 40:18;41:9 helpful (2) 36:17;62:6 helping (1) 63:2 helps (1) 44:17 high (1) 60:14 highly (1) 49:10 Hold (5) 12:17;23:1;29:2;30:7; 45:15 holding (1) 46:20 Honor (85) 4:4,8;5:18,21;7:2,12;8:9, 14;9:9,10,12;10:1;11:4; 12:3,20;16:9;17:17;18:19; 19:5,16;20:19;22:1,13,16;	23:8;24:7;25:6;26:15; 27:16;28:4,6;29:13;30:3; 31:3,16,20;32:10;33:19; 34:8,21;35:6;36:3,12,20; 38:12;39:16;40:3,19;41:3, 10;42:6,7,16,17,21;43:10, 15;44:2,7,10,16,19;45:3,4, 13;46:20;47:15;48:1,16; 51:6,9;52:13;54:4,17; 55:11;56:19;57:5,8,18; 58:12,15;62:8,19;63:19; 64:8 hotel (1) 41:11 hours (2) 9:8;56:10 housekeeping (1) 6:1 HURLEY (1) 10:14 I Iceland (4) 43:21;62:1;63:3,13 Icelandic (1) 44:21 idea (2) 48:13;49:2 identical (1) 47:6 identification (10) 10:3,4,6,7,11,16,16; 27:20;46:8,21 identified (1) 47:12 identify (1) 44:19 imagine (1) 53:9 immunity (2) 5:16,19 impact (1) 52:1 important (1) 57:13 INAUDIBLE (1) 58:8 incident (3) 28:21;29:15;30:13 included (2) 23:10;45:7 including (1) 42:7 inconsistent (1) 12:4 independent (1) 50:19 indicators (1) 21:15 individuals (2) 44:20;63:5 infer (1)
--	--	---	---

56:1 inference (7) 52:10,12,13,15;59:1,3,19 inferences (4) 34:4;55:13;59:5,13 information (40) 7:7;10:5;13:13;21:13,14; 24:19;30:11,13;31:12; 38:18,21;39:2,13;40:9,10; 41:18,21;42:4,8,13;43:3; 45:19;46:3;47:6;49:6;52:2; 53:12,13,21;54:14,19,21; 58:3;59:2;60:7,12,17;61:6, 9;63:9 initially (1) 31:8 inquiry (5) 17:21;18:1,3;31:8;36:6 instead (2) 14:7;20:19 Intelink (1) 47:13 intelligence (3) 37:8;39:4,12 intend (1) 12:1 intended (2) 41:19;42:5 intends (1) 6:16 intent (1) 63:18 interference (2) 55:6,8 Internet (6) 37:8;39:13,14;43:21; 48:18,19 interrupt (1) 11:20 INTERRUPTION (1) 57:1 intervening (1) 51:11 into (7) 6:17;9:17;28:21;29:9,15, 17,19 introduce (2) 5:6;16:8 introduced (1) 18:15 invited (1) 23:9 involved (1) 26:18 Iraq (1) 39:3 issue (7) 15:7;17:9;19:13;35:8,16; 64:11,13 issues (2) 5:3;7:3	J Jeffrey (1) 40:17 job (1) 34:4 Johnson (1) 47:2 joint (1) 39:3 Judge (3) 13:14,19;24:15 judicial (51) 5:9;6:2,4,11,20;8:11; 11:1,10,15;13:17;15:9,12, 17;16:7,13;17:3;19:12; 20:4,8,11,15;22:5,11;27:2; 33:1,6,11,20,21;34:3,10,16, 17;35:4,8;36:2,14,16,20; 38:11;41:12;42:2;44:21; 48:15;49:9;52:13;56:20; 58:2;59:8,11,16 Julian (1) 44:3 June (1) 9:8	52:10 leaks (2) 52:11,19 leaps (1) 34:4 least (1) 26:1 left (1) 43:13 legal (1) 55:2 legible (2) 10:2,17 length (1) 46:5 less (5) 62:2;63:13,16,16,17 letterhead (1) 13:20 level (4) 26:2;41:4;43:21;57:2 light (1) 20:7 likely (8) 25:9,10;38:20;53:11; 62:2,10;63:14,16 lima (4) 43:14,19,19;44:19 line (8) 46:3,4,9;47:3,16,17,18,20 links (1) 34:3 list (5) 6:6;14:5;40:7;41:1;42:12 listed (1) 26:9 litigate (1) 22:17 litigation (1) 22:19 little (4) 11:20;20:12;46:16;59:16 locations (1) 21:16 log-in (1) 10:5 logistics (1) 5:2 logs (1) 28:20 long (1) 4:9 look (3) 29:20;46:19;62:17 looking (2) 29:19;44:12 lots (1) 53:9 louder (1) 20:13	ma'am (92) 4:4,14;7:1,20;8:8,13;9:2, 3;10:14,21;11:7,8,12,13; 12:8;13:7,11;14:10;15:2, 14;16:5,20;17:5,8;18:4,7, 10,17;19:9;20:6,10,14;21:7, 18;22:8;23:15,20;24:5,10; 25:21;27:1,6,21;28:8,12,13, 19;29:8;32:16;34:6;35:15, 18,20;36:4,8,15;37:18; 38:6,16;39:7,21;40:2; 41:16;43:20;44:14;45:10, 17;46:2,10;47:10,20;48:4,9; 49:1,6,11,12,15;50:3,13; 53:18;60:8;61:4,8,12,19; 64:2,5,9,18,19 maintained (1) 40:8 maintaining (1) 41:1 Major (3) 4:2;5:15;8:20 makes (1) 62:9 making (1) 57:19 manner (2) 41:18;42:4 Manning (33) 17:13;18:11;19:5,6;27:4, 17;28:17;29:4;30:14,20; 31:21;32:2,14;33:17;34:1, 14;37:7,18;38:1,18,20; 39:12;41:15;42:4;50:20; 51:2,12,12;54:16;57:20; 60:1;63:8,14 march (1) 5:4 Mark (1) 47:1 marked (14) 5:19;6:2,4,7;8:1,9;4,9,12, 14;11:2,3,4;45:20;46:2 marker (1) 29:3 Maxwell (1) 10:9 May (14) 9:10;13:8;18:9,19;19:6; 21:13;23:20;24:7,7;36:17; 44:8;45:8;46:14;57:4 mean (5) 24:21;26:3;52:21;56:15, 18 means (4) 44:17;53:1;54:15;63:3 media (3) 4:13,16;37:9 meet (1) 53:9 members (5) 4:15;21:17;40:4,14,21 memo (9)
	K Katherine (1) 9:16 kilo (4) 43:14,19,19,20 knew (5) 32:14;33:17,18;34:1,14 knowingly (2) 37:19;42:11 knowledge (4) 17:14;18:14;27:5;32:2 known (1) 15:21		
	L labeled (3) 28:18;32:1,11 labels (1) 30:17 Lamo (2) 18:11;19:6 Larue (5) 12:16;13:6,11;21:3;22:21 Larue's (2) 23:19;25:15 last (7) 4:5,9;5:7,8;19:17,9; 47:10;61:9 lastly (2) 42:17;43:10 later (2) 6:6;37:20 lead (1)		M

13:2;24:11,12,20;25:1,1, 5,8;26:4 memorandum (2) 13:13;24:15 mere (1) 53:11 merits (3) 14:7;22:7,18 messages (2) 20:4;35:10 met (1) 4:21 might (1) 48:5 mike (2) 43:14,18 Military (1) 9:6 mind (1) 63:17 mine (2) 29:7;30:2 minor (1) 6:15 minute (3) 12:17;42:19;45:15 miscellaneous (1) 42:18 Miss (2) 9:15;18:14 misspoke (1) 19:1 mistake (2) 9:17,18 moment (5) 9:10;23:20;51:5;57:4; 58:12 more (15) 7:21;10:2,17;26:19; 34:11;36:6;38:20;53:11; 54:10;57:21;62:2,9;63:13, 16,17 morning (2) 4:14;5:1 MORROW (3) 18:19;45:17;46:1 most (1) 37:6 Motes (3) 40:17;41:7;55:19 motion (9) 6:2,3,11,14,14;11:1; 25:11;35:5;36:18 motions (4) 5:9;6:20;8:12;35:8 move (3) 35:21;36:13;48:8 moves (1) 10:10 moving (2) 41:10;61:21 MRE (3) 31:18;37:2,21	much (3) 55:15,16,20 multiple (1) 49:7 must (1) 30:1	31:21 obviously (3) 12:9;20:17;37:2 OCA (2) 14:15,19 occurs (1) 30:10 October (1) 26:1 off (12) 5:20;11:16;22:15;24:2,6; 26:8;31:5;34:20;49:5;51:8; 57:7;58:14 offense (5) 39:15;42:15;51:4;55:4; 58:16 offenses (6) 37:6,11,18;38:4;39:5; 49:20 offer (5) 16:3,10;23:9;33:7,10 offered (3) 21:2;52:2;60:3 offering (2) 62:16;63:1 Office (1) 24:15 official (2) 13:18,20 Once (4) 5:1;6:5;38:9;46:14 one (36) 4:16;5:10,11;7:4,20; 22:13;24:8;26:14,17,18; 30:8;31:2;32:19;35:5;37:6, 11,13;39:11,19;46:12;49:4, 15,19;50:1,2,10,12,13;51:1, 1,14,15;56:15;61:2;62:13; 64:13 only (10) 8:3;17:2;25:14;37:3,10; 41:5;43:13;50:1;52:4,19 open (1) 10:4 opening (1) 46:1 operational (1) 21:13 operations (2) 4:13;21:16 opinion (14) 13:12;20:21;21:5,8,11; 22:1,2;23:12,15,17,19;25:5; 26:2,7 oppose (2) 33:4;37:2 opposed (1) 36:21 opposes (1) 20:17 oral (6) 5:8;11:6;21:1;31:10;38:9, 14	order (8) 4:2;5:3;6:6;8:17;46:18; 47:5,5,6 orders (1) 9:5 organization (1) 52:9 original (3) 6:17;10:17;60:21 originally (3) 6:15;31:9;60:3 Otherwise (1) 62:18 out (8) 14:4;33:20;34:2,13;48:6; 53:21;54:1;56:14 outlined (1) 43:7 outstanding (1) 64:13 over (1) 5:2 overcome (1) 30:18 owe (2) 64:12,12 owned (2) 42:13;43:4
	N		P
	name (1) 52:10 names (3) 45:6;46:13,19 national (1) 25:3 necessarily (4) 23:13;32:2;54:15,17 need (7) 8:6;10:20;36:1;51:13; 61:2,18;64:7 needed (1) 4:19 negative (1) 36:9 new (3) 9:5;31:20;38:10 next (3) 30:8;40:3;41:10 no- (1) 52:3 notice (52) 5:9;6:2,4,11,20;8:12; 10:15;11:1,10,15;13:17; 15:9,12,17;16:7,13;17:3; 19:13;20:4,8,11,16;22:5,11; 27:3;33:1,7,11,20;34:1,3, 10,16,17;35:4,9;36:2,14,16, 20;38:11;41:12;42:2;44:21; 48:15;49:9;52:14;56:21; 58:2;59:8,11,16 number (6) 28:20;47:5,5,16,17,20 numbers (3) 46:3,9;47:3		page (18) 19:7,8,14;20:4;28:21,21; 29:7,20;30:6,9;44:10,13; 48:12;49:21,21;60:11;61:9, 11 pager (1) 35:10 pages (1) 30:2 paragraph (5) 13:11;21:19;42:2;44:19; 47:11 paragraphs (1) 41:12 part (2) 14:13;40:21 particular (5) 14:17;32:3;53:12,13; 60:13 Particularly (1) 30:15 parties (10) 4:3,5;5:6;6:19;8:11,18; 11:5;24:4;34:5;59:15 past (1) 21:14 PE (1) 48:12 people (7) 45:4;48:17,18;55:14; 56:9;57:12;63:7 people's (1)
	O		
	object (12) 25:9,10;27:6;31:13,16; 33:3;34:8,21;35:9,10,12; 55:11 objected (1) 43:11 objecting (5) 20:3;34:11,15;35:4;56:16 objection (17) 7:13,17;10:13,19;15:12; 16:4;17:2,18;20:8;22:10; 26:10;30:19;31:7;35:2; 50:8;52:17;56:6 objections (2) 50:7,9 obvious (1)		

45:6 period (1) 57:2 person (8) 45:14;47:10,11,12,14,17; 48:6;63:15 persons (1) 40:8 PFC (33) 17:13;18:11;19:5,6;27:4; 17:28;17:29;4;30:14,20; 31:21;32:2,14;33:17;34:1, 13;37:7,18;38:1,17,20; 39:12;41:15;42:3;50:20; 51:2,11,12;54:16;57:19; 60:1;63:8,14 picture (2) 27:15;28:7 pie (1) 53:2 piece (8) 17:9;23:5;25:19;52:1; 53:1,12,13;57:9 pieces (1) 39:2 PII (1) 43:2 plaintiff's (1) 10:15 please (6) 4:3;13:9;18:9;23:21; 45:8;49:4 pm (1) 29:4 point (10) 6:18;8:6;13:1,10;17:14; 18:16;24:8;27:4;33:19; 50:18 points (1) 14:4 policy (1) 43:2 portion (2) 8:1;21:5 portions (5) 7:6,14;8:2,3;42:13 position (21) 7:9,11;12:4,21;13:2; 14:12,18;15:4;19:12;20:18; 21:4;26:21;32:18;34:19; 51:10,17,19;53:3;56:9; 57:16;63:18 positions (1) 44:21 posted (1) 55:7 potential (1) 21:15 prefer (1) 22:17 prepared (2) 22:12;40:7 present (6)	4:5,7,11;8:18,19;12:2 presentation (1) 5:14 presented (4) 12:1;47:2;48:13;59:14 previously (1) 9:14 prior (1) 37:5 privacy (1) 42:20 probative (2) 60:10,13 proceed (2) 11:6;17:7 proceeding (1) 64:16 PROCEEDINGS (1) 4:1 produce (1) 22:12 producing (3) 26:11;40:10;41:1 production (1) 25:11 proffer (1) 26:15 program (1) 42:20 proper (6) 11:15;13:17;15:17;16:13; 52:13;59:8 prosecution (52) 5:10;9:13,14,20;10:2,5,6, 9,11,12;12:15;13:8;17:15; 18:8;19:9;21:3;23:2;27:10, 13,14,19;28:11,14,19; 30:16;35:12;36:14;40:19; 41:6;43:16;44:6,8,12,18; 45:5,16,18;46:7,8,11,14,21, 21;47:2,11,14,19;48:2,7; 62:4,4;64:14 protect (1) 43:2 protections (1) 25:6 prove (5) 32:2;51:13,16;52:21;54:9 provide (2) 21:16;49:7 provided (3) 9:19;24:20;31:17 providence (5) 17:21;18:1,2;31:8;36:6 provides (1) 21:15 public (1) 8:2 publish (2) 53:8,9 published (7) 37:8;39:12,13;51:3,3; 54:11,14	publishes (2) 52:4,19 publishing (3) 52:8,11;53:11 purely (1) 20:20 purloining (3) 37:19;42:11;57:20 purpose (9) 24:12,14;25:1,8;26:4; 41:19;42:5;59:4;63:2 purposes (2) 6:1;41:20 pursuant (1) 31:18 put (6) 13:3;19:12;27:16;42:9; 46:3;49:17 puzzle (4) 23:4,5;25:19,20 R raised (2) 31:10;50:3 range (2) 56:10,11 rank (4) 40:18,21;41:9;55:14 ranks (2) 40:8,8 RCM (2) 4:21;7:4 read (7) 7:8,9,15;8:2;9:17;21:21; 23:11 reading (3) 7:14;21:12;42:1 reads (1) 20:19 ready (1) 11:5 really (1) 33:19 Rear (12) 11:14;12:13;13:14,18; 14:18;20:19;21:19;22:5; 23:6,9,11;35:17 reason (1) 14:1 reasons (3) 13:21;43:1,7 rebut (5) 12:14;18:13;21:2;23:7,18 rebutals (2) 13:5,15 receipt (1) 51:16 recess (6) 5:13;8:15,16;24:4;60:15; 64:20 recessed (2) 4:5;8:19	reconvene (1) 8:11 record (23) 5:7,16;6:8,13,18,19;7:8; 8:3,18,21;9:17,20;10:2; 22:15;24:2,6;31:5;32:13; 34:20;49:5;51:8;57:7;58:14 redactions (1) 9:18 refer (1) 46:4 reference (2) 29:13;44:3 referenced (1) 10:8 references (2) 28:20;47:17 referring (1) 18:20 reflect (1) 8:18 reflected (1) 6:5 regard (1) 59:21 regarding (1) 21:4 regards (1) 52:7 regulation (6) 41:12,19;42:8,13;43:7; 61:18 regulations (2) 43:1;60:18 related (1) 17:10 relation (1) 55:17 relatively (1) 5:5 release (1) 42:15 released (3) 37:9,20;38:17 releases (5) 36:19,21;37:5;39:18; 49:18 releasing (1) 38:18 relevance (18) 12:13;17:10;23:6;26:11; 27:6;31:8;34:14,16;37:1; 38:5;39:17;41:14;49:17; 50:7;52:17,21;55:11;57:9 relevant (39) 11:16;17:11;22:18;27:3, 11;30:18;33:6;34:17;37:3, 10,12,16,17;39:5,14;40:11, 15;41:2,5;42:10,15;44:1; 45:2;50:8;51:11,21;52:18; 53:7;54:15;56:7,12;57:13; 58:10;59:5,17;62:1;63:7,8, 18
--	---	---	---

reliability (1) 13:21 relies (1) 38:4 rely (1) 19:20 relying (1) 58:5 remaining (2) 35:8,16 remember (2) 32:9;61:3 replaced (1) 10:1 reply (1) 19:15 report (1) 4:13 reporter (2) 4:6,7 reports (1) 39:4 request (38) 5:20,21;13:1;18:20;19:2, 3,13;20:11;27:3,5,18;28:16, 17,18;29:11,16,17,21; 30:15,17,20;31:12;32:1,3,4, 4,5,9,11,15,20;33:4,18; 34:3;35:1;36:14,20;55:12 requested (1) 58:1 requesting (2) 20:15;22:6 requests (9) 11:10;20:4;32:20;33:14, 16;34:1;35:11;36:2,16 require (2) 7:6;33:12 requirement (1) 55:4 requiring (1) 7:15 research (3) 29:5,14;30:11 researching (1) 30:13 resources (1) 49:7 respect (20) 5:9;6:11;14:13;15:5; 18:6;19:12,20;32:18;36:1; 39:1;46:8,9;50:21;53:20; 54:4;55:10;58:4;59:20; 60:2;62:12 respective (1) 39:20 respond (2) 32:5,15 responded (4) 6:14;32:8;33:18;34:2 response (15) 6:1,4,14,17;11:3,18,21; 15:8,10,13;17:12;27:6;	31:13;35:2,11 rest (1) 19:19 results (1) 23:1 retrieve (1) 48:6 Reuters (7) 27:18;28:16,17,18;30:15, 17;32:20 revealing (2) 23:5;25:19 review (2) 11:14;26:5 revised (1) 6:12 right (36) 4:12,20;8:10;10:15;11:5; 15:3;16:4;17:6,20;26:20; 28:2;30:21;33:14;35:17,21; 36:7;38:13;44:12;45:11,12; 46:6;47:8,21;48:8;50:1; 51:18;55:9;58:7,20;60:15; 61:1,16;63:20;64:3,6,10 road (1) 55:3 Robert (2) 4:7,8 Rouillard (1) 40:20 ruling (2) 18:5;64:12 run (1) 14:21 S salary (7) 40:3,14;56:6,7,10,11,17 Salerno (3) 13:17;14:3,13 same (11) 9:13;41:3;42:21;43:7; 45:19;46:3,7,17,18;60:11; 63:4 satisfy (1) 14:3 saw (1) 17:2 saying (6) 21:8;22:21;23:4,12,16; 52:17 scale (2) 40:9;41:4 scheduling (1) 5:2 scope (1) 26:16 screenshot (1) 45:18 screenshots (1) 10:4 search (1)	47:14 second (8) 15:9,13;18:12;21:19; 22:13;27:1;31:2;49:4 seconds (1) 29:4 security (1) 25:3 seem (1) 60:11 seems (1) 15:8 select (1) 41:12 send (1) 48:5 sensitive (1) 13:12 sentence (3) 21:9,12,19 sentencing (3) 14:5,6,11 serious (1) 25:3 service (3) 40:4,14,20 session (4) 4:15;5:5,7;7:16 sessions (1) 7:8 set (3) 31:9;40:3;41:10 sets (3) 37:9;39:6,18 seven (1) 46:4 several (1) 36:16 Shaw (2) 4:7,8 short (1) 5:5 show (8) 37:4,21;38:19;44:5; 54:16;55:6;56:3;58:18 Showman (1) 18:14 shows (1) 38:20 side (1) 5:10 sides (5) 28:10;35:19;38:10;46:6, 16 signed (1) 5:17 similar (1) 51:17 simply (3) 25:11,16;26:16 soldiers (1) 40:17 solely (1)	38:4 solving (1) 25:20 someone (1) 48:6 something's (1) 26:8 sorry (11) 9:10;11:20;19:1;20:14; 30:3,7;42:21;46:14;48:1,4; 62:4 sort (1) 46:5 source (1) 10:4 sources (2) 31:17;33:5 speak (1) 20:12 speaking (1) 19:3 spec (2) 37:11;51:14 specialist (1) 40:21 specific (1) 21:16 specifically (4) 29:13;44:3;47:17;59:21 specification (18) 37:6,13;39:11,19;40:13, 15;41:5,17;42:10;43:5,6; 49:19;50:2;51:1;58:6,6,15; 62:13 specifications (6) 37:14,15;39:6,20;58:10; 59:20 spectators (2) 4:17,17 spending (2) 55:16,16 stamp (2) 29:9,21 standard (1) 37:21 star (1) 13:19 start (3) 4:15;31:6;50:15 started (1) 26:6 Starting (1) 29:3 state (1) 63:17 statement (9) 12:13;18:16;20:20;21:8, 21;22:5;23:11;25:7;46:1 statements (3) 18:14,15;36:6 States (11) 10:10;20:17;24:10;25:1, 10,16;36:15;42:14;43:4;
---	---	--	--

49:17;52:6 stating (1) 23:9 stealing (3) 37:18;42:11;57:20 stenographer (1) 4:16 step (2) 16:17,17 still (6) 22:17;32:1,6;33:6;34:12; 64:11 stipulate (6) 12:6,8,10;15:15;33:15; 48:20 stipulating (2) 12:11;16:1 stipulation (12) 7:10;9:15,16;10:8;12:15; 14:8,16;22:20;25:16;40:5, 16;41:7 stipulations (4) 7:6,7,17,21 stole (1) 54:16 Strobl (1) 9:16 stuff (1) 14:17 subparagraph (2) 41:11;43:14 subsequent (1) 38:17 substance (1) 33:17 substitution (1) 28:7 suddenly (1) 38:9 sufficient (2) 8:10;31:18 suggest (3) 27:17;28:16;49:10 suggested (1) 17:12 suggests (3) 29:18;30:14,20 summarily (1) 18:5 summary (1) 47:13 support (2) 15:20;33:20 sure (4) 19:8;53:3;60:21;62:19 system (7) 41:18;42:4,8;59:2;60:12, 17;61:9 systems (3) 41:21;60:7;61:6	talk (5) 15:1;29:10,20;34:18; 46:11 talked (3) 26:12;28:3;50:11 talking (10) 29:4,5,5,12,14;30:5,12; 45:12;52:17;61:17 talks (2) 17:20;43:1 task (1) 39:3 tasker (1) 24:12 team (1) 19:13 technical (1) 52:20 telling (1) 32:13 term (5) 43:20;44:4;47:14;53:4; 62:5 termed (1) 42:17 termination (1) 24:14 terms (2) 21:15;48:19 test (3) 13:17;14:3,13 testify (1) 33:13 testimony (28) 7:18;8:1;9:15,16;10:9; 13:5;14:1,9,16;21:3;22:18, 21;23:7;25:16;26:16;40:5, 6,16,20;41:7;46:4;47:1; 54:20;55:13,15,18,20;56:13 Thanksgiving (1) 43:11 theme (1) 54:20 theories (1) 38:10 theory (2) 49:17;55:2 therefore (3) 7:14;25:2;56:10 thereto (1) 27:6 thousand (2) 54:10;57:21 three (8) 13:19;15:1;35:5;41:17; 43:6;45:4;46:13;49:21 throughout (1) 54:20 thus (1) 25:7 tie (1) 29:17 timeframe (3)	38:1,17,21 times (1) 56:10 titled (1) 28:15 TJA (1) 14:3 Today (4) 5:5,8,13;64:7 told (1) 56:16 tomorrow (3) 5:13;64:16,20 TOOMAN (83) 11:7,11,12;12:14,19;13:7, 10;14:14;15:2,5;16:6,9; 17:6,8,17;18:4,7,10,17,21; 19:1,8,11,16,19;20:1;22:8; 27:13,21;28:2,7,13;29:3,8, 12,18;30:3,9;35:20;36:3,8, 12;43:12;46:10;49:1;50:5, 10,13,15,18;51:5,9,20; 52:12;53:3,6,18;54:17;55:5, 10;56:13,19;57:4,8,17; 58:12,15,20;59:7,21;60:8, 19;61:10,12,15,19;62:7,12, 19,21;63:6,11;64:2 top (1) 43:21 totality (1) 30:14 towards (2) 22:1;51:4 trailer (2) 4:18,18 transcript (10) 15:5,6,15,16;16:2,3,17; 17:3;35:12,14 translation (1) 48:12 trouble (1) 59:10 true (3) 49:3;56:5;63:11 trying (1) 59:19 TTP (3) 21:5;23:14;24:18 TTPs (14) 13:12,15;21:4,17;23:4, 14;24:19;25:8,14,17,19; 26:3,13,18 twice (1) 45:21 two (21) 7:3;16:19;32:19;35:5,13; 37:7,11,13;39:11,19;41:6; 42:10;43:6;46:17;49:19; 50:2;51:1;58:6,7;60:5; 62:13 TXT (1) 45:5 tying (2)	57:9,11 type (2) 32:3;43:2 U unauthorized (2) 41:20;63:15 unclassified (10) 8:2;12:5,9,12;20:21;21:9, 14,21;22:2;25:7 under (9) 5:12;21:13;22:18;26:1; 34:7;37:2,21;60:3;64:11 understands (2) 52:5;64:11 Understood (1) 62:19 unfortunately (1) 49:16 unit (1) 21:16 United (9) 10:10;20:17;24:10;25:10; 36:15;42:14;43:4;49:17; 52:6 up (4) 19:11,14;35:7;36:17 update (1) 6:6 use (1) 54:19 used (6) 4:19;42:4;47:15;48:17, 19;62:5 using (2) 13:17;41:18 V valuation (1) 41:2 value (21) 40:9,10;43:3;54:6,8,12; 56:2,3,11;57:11,19;58:3,11, 17,18,19;59:2,3;60:10,13; 63:16 various (2) 39:5;60:17 verbatim (2) 15:15;16:21 verifiable (1) 16:11 verified (1) 22:21 verify (1) 16:14 version (1) 45:17 versus (1) 21:5 Vice (1) 14:15
T			

video (31) 11:17;12:2,5,9,12;13:12; 14:17,20;15:6,16;16:11,17; 17:11;19:3,4;20:17,21; 21:20;24:14;25:14;26:1,18; 29:4,12;30:5,10;35:14;37:4, 20;39:2;57:1 videos (1) 38:1 viewed (1) 30:16 volumes (1) 45:5 von (1) 4:10	willing (1) 12:6 withdraw (1) 35:2 witness (11) 5:20;6:6;14:5,11;22:6,12; 23:4;26:11,12;54:20;56:14 witnesses (1) 33:12 words (1) 21:10 worked (2) 55:14;56:9 working (1) 55:19 worth (2) 54:10;57:21 wrap (1) 35:7	14;30;16;35:12 16 (6) 40:14,15;42:10;43:6; 58:6,15	401 (3) 37:2,2,21 49 (3) 47:20;48:3,7
W		2	5
Wait (1) 42:19 warrant (2) 24:20;25:6 warranted (1) 24:19 warrants (3) 25:2,15;26:3 Washington (1) 9:6 watch (1) 16:11 watched (1) 30:10 way (2) 53:19;59:17 week (2) 4:9;5:4 welcome (1) 52:15 weren't (3) 12:20;13:1;17:17 what's (8) 16:6;18:8;27:9;30:8; 32:18;41:14;51:11;57:13 whole (1) 61:18 Whyte (75) 4:11;11:8;12:3,8;14:10; 15:14,19;16:5,20;17:5;20:6, 10,14;21:7,18;22:13,16; 23:8,15;27:1;31:1,2,6,16, 20;32:8,16,21;33:3,15;34:6, 8,12,21;35:6,15,18;36:4,15; 37:17;38:6,12,16;39:7,10, 16,21;40:2,13;41:16;42:21; 43:10,15,20;44:2,7,10,14, 16;45:3,10,13;47:10,19; 48:1,4,9,16;49:4,6,11;58:8; 61:4,8;64:5 WikiLeaks (21) 36:19,21;37:9,20;39:18; 49:18;50:19;51:12;52:1,3,5, 10,18,19;53:6;54:2,11,13; 55:7;63:9,14	Y year (1) 57:10 Z zone (1) 28:15 0 0001 (1) 9:7 0930 (2) 64:17,21 1 109 (1) 64:14 11:30 (2) 5:8;8:10 117 (4) 12:15;13:9;21:3;23:2 123 (4) 44:7,9,13;62:5 127 (6) 45:18;46:7,12;47:1,3,12 13 (2) 26:1;48:11 131 (2) 40:19;41:6 135 (3) 9:13,14,21 137 (1) 10:10 138 (5) 10:3,6,11,12,16 139 (5) 10:3,7,11,12,16 15 (8) 4:16;27:14,19;28:4,11,	2:07:41 (1) 30:9 2:24 (1) 30:1 2:24:58 (1) 29:21 2004 (1) 57:10 2007 (1) 30:10 2009 (1) 30:11 201 (1) 31:18 2010 (1) 26:1 2013 (1) 9:8 24 (1) 9:8 25 (1) 19:6 25-1 (9) 41:13;42:6;43:7;60:1,1,3, 7,19;61:13 25-2 (6) 42:1,8;43:8;59:13;60:2,7 25-400-2 (2) 60:9;61:17 26 (3) 28:21;29:7,8 27 (2) 29:1,9	574 (1) 6:3 575 (1) 6:7 576 (2) 6:5;11:2 577 (2) 6:5;11:3 578 (2) 5:19;47:20 580 (1) 9:4 581 (1) 47:20
			6
			6:19:16 (1) 44:14 641 (8) 37:17;39:5,8,19;40:13; 42:15;55:4;58:16 641s (2) 49:19;54:4
			7
			703 (1) 22:18 793 (4) 37:11;38:7;49:20;51:21 793E (4) 37:15;38:4;39:8,20
		3	8
		3:10:32 (2) 29:3,9 30 (7) 17:15;18:8;27:10,14; 28:20;48:12;62:4 31 (1) 64:14 32 (1) 64:14 33 (3) 29:20;30:6,9 34 (2) 30:2,3 39 (5) 45:5,16;46:8,15,21	802 (3) 4:21;6:8;7:4 81 (2) 48:2,3
		4	9
		4 (2) 43:12;58:6	9/11 (2) 20:4;35:9